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In The

Supreme Court of the United States

October Term, 1995

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, JOHN GRECO and JOSEPH PORCARO,

Petitioners,

vs.

DENNIS KORNWOLF and STEPHEN SIMANEK, in their individual capacities, and RACINE COUNTY, a municipal corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ELIZABETH ADELMAN
Counsel of Record

LYNN ADELMAN

Counsel for Petitioners

ADELMAN, ADELMAN & MURRAY, S.C.
308 East Juneau Avenue
Milwaukee, Wisconsin 53202
(414) 225-2920

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1) Where state law provides that employment for a specified duration creates a property interest and triggers due process protections, does a court order appointing individuals to positions as bailiffs for a specified duration create a property interest, or must the order also include "explicitly mandatory language" whereby the court expressly prohibits itself from terminating the bailiffs without cause?

2) May federal courts apply the "explicitly mandatory language" standard to questions regarding the creation of property interests even though this Court has never approved the use of the standard in the property interest context and has now rejected the standard in the only context in which it was formerly applied, that of prisoners' rights?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Joan Flynn, Robert Bertermann, Eva Christopherson, Sally Guzek, Paul Rosenquist, Jay Wildfong, Ed Bowman, Shirley Dandeneau, Bonnie Fuller, Helen Hess, John Greco and Joseph Porcaro, herein pray that the United States Supreme Court grant a Writ of Certiorari to review the opinion and judgment of the Seventh Circuit Court of Appeals in this matter, entered May 15, 1996.

OPINIONS BELOW

The May 15, 1996, opinion of the Seventh Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 83 F.3d 924, and is reprinted in the separate Appendix to this Petition, pp. 1-7. The prior opinion of the United States District Court for the Eastern District of Wisconsin, entered and dated June 1, 1995, bears Case No. 94-C-0908 and is unpublished, but is reprinted in the separate Appendix to this Petition, pp. 8-17.

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on May 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wis. Const. art. VII, § 8.

> **Circuit court: jurisdiction.** Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may

prescribe by law. The circuit court may issue all writs necessary in aid of its jurisdiction.

Wis. Stat. § 753.10(3) (1991-1992).

Attendance of officers, pay; opening court. (3) Unless otherwise directed by the presiding judge, no officer, other than the clerk, shall be paid for attending court or the judge if the court is not engaged in the trial of jury cases. Every officer attending court upon the order of the presiding judge shall have the same powers and authority as the sheriff, and shall be paid out of the County treasury, upon the certificate of the judge, compensation equal to that fixed by the County board. No such officer may be paid for any day when the court is not in session unless specially ordered by the presiding judge.

STATEMENT OF THE CASE

Beginning in May of 1991, Racine County Circuit Court judges instituted a practice of issuing serial court orders appointing certain individuals, the Petitioners among them, to employment as bailiffs. The Clerk of Courts, who had formerly appointed such individuals, notified the bailiffs of this change in procedure.

Each of the appointing orders contained a specified duration in which the order would be in effect. The first order was dated May 15, 1991, and was to be "effective for a period of sixty (60) day (sic) from the date of signature." (App. 20.) The second order was "effective immediately this date, December 19, 1991 and shall expire January 31, 1993." (App. 23.) The third order was

signed by each of the nine county judges in March of 1993, and stated, "[t]his order expires on 12-31-93." (App. 25.)

In 1992, Racine County officials were notified that the county had failed to provide pension benefits to the Wisconsin Retirement System on the bailiffs' behalf. Wisconsin law required that all employees working more than 600 hours for those municipalities opting into the system must be included in the system. Wis. Stat. § 40.22(2m) (1991-1992). Although they were part-time employees, the bailiffs had each worked in excess of 600 hours per year prior to 1992.

In the summer of 1992, Respondent, Racine County Executive Dennis Kornwolf, decided that the Petitioners should be laid off to prevent them from obtaining pension coverage for 1992. (By August of 1992 most of the bailiffs had not yet worked 600 hours.) In August of 1992, Respondent, Chief Judge Stephen Simanek, working with Kornwolf, placed newspaper advertisements in local newspapers seeking replacements for the bailiffs. (App. 36.) Subsequently, the Respondents hired replacements for the Petitioners.

Notwithstanding that the court order specifying that the Petitioners were employed until January 31, 1993, remained in effect, Kornwolf, in September of 1992, laid off the Petitioners. Kornwolf undertook these layoffs despite the bailiffs having offered to work for less pay in order to keep their jobs (App. 37), and despite the Racine County Corporation Counsel having advised that the layoffs were illegal.

The bailiffs sought unemployment benefits, which the county opposed. In a strongly-worded decision, an administrative law judge awarded the bailiffs unemployment benefits. (App. 38-42.) The county subsequently recalled the bailiffs in January of 1993, renaming them "court attendants."

To keep the court attendants' hours below 600 per year, the county retained the replacement workers it had hired in September of 1992, and instituted a practice of assigning only one court attendant per jury rather than the former practice of two. Because of the resulting reduction in hours of available work, two court attendants were forced to retire. They applied for and received pension benefits.

At some point thereafter, Kornwolf and Simanek decided to terminate the court attendants' employment and replace them with Kelly Temporary Service employees. In May of 1993, Simanek terminated the court attendants. He also notified them that if they wished to apply to the Kelly Temporary Service, they would be assigned to the courthouse and would perform the same duties they had previously performed as county employees.

The cost to Racine County, per hour, to employ the part-time court attendants was $6.54 without pension, and $6.90 with pension. The cost to Racine County, per hour, to appoint Kelly Temporary Service employees to the same position was $7.20 per employee.

Following their termination, the Petitioners filed suit in the United States District Court for the Eastern District of Wisconsin, invoking the court's jurisdiction under 28

U.S.C. §§ 1331 and 1343(a)(4). In their Amended Complaint, the Petitioners claimed, *inter alia*, that their September 1992 layoff and May 1993 termination, without notice or hearing in either instance, deprived them of constitutionally protected rights in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. (App. 33-34.) In response, the Respondents moved to dismiss the Amended Complaint contending that the Petitioners lacked a property interest from which they could claim a right to due process.

The district court dismissed the complaint holding that the court order did not create a property interest. (App. 14-15.) The Petitioners appealed to the Seventh Circuit Court of Appeals, invoking the court's jurisdiction under 28 U.S.C. § 1291. The court of appeals acknowledged that the court order was for a specified duration (App. 6), but held that it, nevertheless, did not create a property interest because "[n]owhere does the order state in 'explicitly mandatory language' that the appointing judges have limited discretion to terminate the plaintiffs' employment at the judges' will." (App. 6-7.) The court of appeals went on to hold that "the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property interest that would trigger due process protections." (App. 7.)

SUMMARY OF ARGUMENT

There are several critical reasons why this Court should grant the Petition and review this case. The Seventh Circuit Court of Appeals ignored the decisions of this Court in at least two important areas.

First, this Court's decisions have established that property interests in employment are determined solely by reference to state law. This is an important doctrine because it represents this Court's adherence to the fundamental principles of federalism which underlie our constitutional jurisprudence.

Wisconsin law provides that a property interest in employment exists where the employment is for a specified duration. Such employment is terminable only for cause.

The Seventh Circuit Court of Appeals ignored Wisconsin law. If the court had looked to Wisconsin law it would have had to conclude that a court order creating employment for a specified duration creates a property interest and triggers due process protections. Instead, the court of appeals imposed a requirement which does not exist in Wisconsin employment law, namely that the court order include "explicitly mandatory language" in addition to the appointing judges' clear statement that the bailiffs were to be employed for a specified duration of time.

The court of appeals' decision that a clear and unambiguous court order creating employment for a specified duration cannot be relied on unless the court includes language expressly prohibiting itself from violating the

terms of the order is unreasonable. Inasmuch as court orders are, in fact, a form of law, the decision of the Seventh Circuit Court of Appeals suggests that courts are above the law. The decision, therefore, undermines both the rule of law and the integrity of the judiciary.

Secondly, the use by the Seventh Circuit Court of Appeals of the "explicitly mandatory language" standard was error for another reason. This Court has never applied the standard to the question of whether a document creates a property interest in employment. Indeed, this Court has recently rejected the "explicitly mandatory language" standard as inappropriate even in the only context in which this Court has ever applied it, that of prisoners' rights.

It is important that this Court make clear to the federal judiciary that the "explicitly mandatory language" standard is not the appropriate test for determining whether a property interest in employment exists.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO MAKE CLEAR THAT THE SEVENTH CIRCUIT COURT OF APPEALS' USE OF THE "EXPLICITLY MANDATORY LANGUAGE" STANDARD TO DETERMINE WHETHER THE PETITIONERS HAD A PROPERTY INTEREST IN THEIR EMPLOYMENT WAS ERROR BECAUSE STATE LAW PROVIDES THE SOLE REFERENCE FOR DETERMINING SUCH INTERESTS.

A. This Court Has Consistently Held That State Law Is The Sole Reference By Which Property Interests In Employment Are To Be Determined.

In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court stated:

> Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In *Bishop v. Wood*, 426 U.S. 341, 344 (1976), this Court again stated that when seeking to determine the existence of a property interest in employment, "the sufficiency of the claim of entitlement must be decided by reference to state law."

And, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court held that although the degree of due process required before one can be deprived of a property interest in employment is governed by the Constitution once such an interest is found to exist, it is state

law that determines whether such an interest exists in the first place. *See id.* at 538, 541. In other words, in the context of property interests in employment, the state determines whether process is due while the Constitution determines how much process is required.

B. Wisconsin Law Provides That A Property Interest In Employment Exists Where The Employment Is For A Specified Duration.

Wisconsin law provides that if employment is not at-will, a property interest exists in that employment. *Vorwald v. School Dist. of River Falls*, 482 N.W.2d 93, 96 (Wis. 1992), *cert. denied*, 506 U.S. 941 (1992). Wisconsin law further provides that where employment is for a specified duration, it is not employment at will. *Larson v. City of Tomah*, 532 N.W.2d 726, 729 n.7 (Wis. 1995) ("An employee-at-will is one who is hired for an indefinite period of time and who may be discharged without cause."); *Heinritz v. Lawrence University*, 535 N.W.2d 81, 83 (Wis. Ct. App. 1995) ("Employees hired for an indefinite term without a formal written contract are employees-at-will."); *Wandry v. Bull's Eye Credit Union*, 384 N.W.2d 325, 326 (Wis. 1986) ("an employee hired for an indefinite period is dischargeable at the will of the employer"); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 837 (Wis. 1983) ("The [employment at will] doctrine recognized that where an employment was for an indefinite term, an employer may discharge an employee 'for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.' " (quoting Lawrence E.

Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1405 (1967))).

In *Vorwald v. School Dist. of River Falls, supra*, the court restated the traditional doctrine that employment at will is the rule unless "civil service regulations or laws, or a contract or collective bargaining agreement" create an exception. *Id.*, 482 N.W.2d at 96. The context in which the court made this statement makes clear that the court did not intend to exclude court orders as potential sources of property interests. The court was merely identifying the more typical kinds of documents which create property rights in employment. The court made clear later in the opinion that a variety of documents could create property interests and cited as examples employee handbooks and personnel policies. *Id.*

The creation of a property interest under Wisconsin employment law does not depend on the form of the document establishing the employment relationship but on whether the document states that the employment is for a specified duration. The opinion of the Seventh Circuit Court of Appeals was correct to the extent that it recognized that under Wisconsin law a court order could be the source of a property interest in employment.

Indeed, court orders are recognized as independent sources of law in Wisconsin. Circuit courts are constitutionally empowered to make such orders as are necessary to aid them in their jurisdiction. *See* Wis. Const. art. VII, § 8; *see also Stevenson v. Milwaukee County*, 121 N.W. 654, 656 (Wis. 1909) ("The power to appoint necessary attendants upon the court is inherent in the court in order to

enable it to properly perform the duties delegated to it by the constitution."); *Wisconsin ex rel. Friedrich v. Cir. Ct. of Dane County*, 531 N.W.2d 32, 37 (Wis. 1995) ("In addition to the powers expressly granted to the courts under the constitution, courts have inherent, implied and incidental powers."); *In re Guardianship of Eberhardy*, 307 N.W.2d 881, 886 (Wis. 1981) ("Unlike the relationship between the Congress and the federal courts, under which the Congress may grant or withhold jurisdiction as it pleases, in Wisconsin the jurisdiction and the power of the circuit court is conferred not by act of the legislature, but by the Constitution itself.").

Thus, under Wisconsin law, a court order employing court personnel is an example of judges exercising inherent power under the state constitution. Such an order is accorded no less respect than a legislative enactment. The Petitioners in this case were entitled to rely on this court order. Because the order stated that their employment was for a specified duration, under Wisconsin law, it gave the Petitioners a property interest in their employment.

C. There Is No Requirement In Wisconsin Law That Language Creating A Property Interest In Employment Must, In Addition To Specifying The Duration Of Employment, Contain "Explicitly Mandatory Language."

Neither the Wisconsin Supreme Court nor any Wisconsin appellate court has ever used the "explicitly mandatory language" standard to determine whether a document creates a property interest in employment. The "explicitly mandatory language" standard is simply not a

part of Wisconsin employment law. As discussed above, a property interest in employment arises in Wisconsin if the employment is terminable for cause. *See Vorwald*, 482 N.W.2d at 96. Under Wisconsin law, a document creating employment for a specified duration is regarded as being, in itself, sufficiently explicit to justify the employee's reliance on it. *See generally Larson v. City of Tomah*, 532 N.W.2d at 729 n.7; *Heinritz v. Lawrence University*, 535 N.W.2d at 83; *Wandry v. Bull's Eye Credit Union*, 384 N.W.2d at 326; *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d at 837.

The only mention of the "explicitly mandatory language" standard in Wisconsin case law is in the context for which the standard was created – the determination of inmates' liberty interests in prisoners' rights cases.[1] *See, e.g., Casteel v. McCaughtry*, 500 N.W.2d 277 (Wis. 1993) (applying standard to prison regulations to resolve inmate's liberty interest claim); *Yoder v. Palmeri*, 502 N.W.2d 903 (Wis. Ct. App. 1993) (applying standard to prison regulations to resolve inmate's liberty interest claim); *Irby v. Macht*, 522 N.W.2d 9 (Wis. Ct. App. 1991) (applying standard to prison regulations to resolve inmate's liberty interest claim). Simply put, the standard which the Seventh Circuit Court of Appeals used to deny the Petitioners' property interest in their employment is not part of Wisconsin employment law.

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[1] As will be discussed in Part II, *infra*, this Court's decision in *Sandin v. Conner*, 115 S. Ct. 2293 (1995), rejected the "explicitly mandatory language" standard even for application to liberty interest questions in prisoners' rights cases.

D. The Seventh Circuit Court Of Appeals Refused To Follow State Law To Determine Whether The Petitioners Had A Property Interest In Their Employment.

The Seventh Circuit Court of Appeals began its analysis of the Petitioners' property interest claims with the following correct statement of the law:

> If the plaintiffs had property rights in their employment, the defendants could not deprive them of those rights without adequate due process. Whether the plaintiffs had a substantive property interest in their jobs is a question of state law. The relevant inquiry under Wisconsin law turns on whether the employment is at-will. Employment at will, in which the employee has no property interest, is the rule. On the other hand, an employee terminable only for cause has a property interest in his employment.

App. at 3-4 (citations omitted).

The court then went on to ignore state law. The court said:

> Although the court order appointing them to their positions did contain an expiration date, it "place[d] no substantive restriction on the County's [or the appointing judges'] authority to terminate" the plaintiffs before it expired. Nowhere does the order state in "explicitly mandatory language" that the appointing judges have limited discretion to terminate the plaintiffs' employment at the judges' will. Absent such language, the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property

> interest that would trigger due process protections.

Id. at 6-7 (alterations in original).

The "explicitly mandatory language" standard does not exist in Wisconsin employment law. By using this standard the Seventh Circuit Court of Appeals clearly violated this Court's repeated and unambiguous statements that the question of whether a property interest in employment is created is determined solely by reference to state law.

Moreover, the Seventh Circuit Court of Appeals' use of this standard in connection with the facts of this case is bizarre. The document creating the property interest in this case was an unambiguous court order specifying that the Petitioners were to be employed as bailiffs for a specified duration of time. To hold that the Petitioners could not rely on this court order because the order did not include language making it "explicitly mandatory" is unreasonable. What must the court order say? That the court forbids itself from revoking the order? No court would ever use such language. It was bad enough for nine Racine County judges to ignore their own order. Since then two federal courts have held that, notwithstanding its clear language, the order meant nothing. This Court must hear this case if for no other reason than to vindicate the integrity of the judiciary.

II. CERTIORARI SHOULD BE GRANTED TO MAKE CLEAR THAT THE "EXPLICITLY MANDATORY LANGUAGE" STANDARD, WHICH THIS COURT HAS NEVER APPROVED IN THE PROPERTY INTEREST CONTEXT, AND HAS RECENTLY REJECTED IN THE PRISONERS' RIGHTS CONTEXT, SHOULD NOT BE USED BY FEDERAL COURTS TO DETERMINE WHETHER A PROPERTY INTEREST EXISTS.

For the past several years, the Seventh Circuit Court of Appeals has been using the "explicitly mandatory language" standard to determine the existence of property interests in employment. *See, e.g., Miller v. Crystal Lake Park Dist.*, 47 F.3d 865, 867 (7th Cir. 1995); *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1406 (7th Cir. 1994); *Listenbee v. City of Milwaukee*, 976 F.2d 348, 353 (7th Cir. 1992). The use of this standard in this context is a practice which this Court has never approved and which it should now expressly disapprove.

The "explicitly mandatory language" standard was first used by this Court in *Hewitt v. Helms*, 459 U.S. 460 (1983), and reiterated in *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989). Neither *Hewitt* nor *Thompson*, however, involved the question of how an individual gained a property interest in his or her job. Both cases dealt with the issue of when a prison inmate had a liberty interest. In *Thompson*, for example, the question was whether suspension of a prisoner's visitation privileges implicated a liberty interest which entitled the prisoner to due process protections. *Id.*, 490 U.S. at 455.

This Court has never cited *Hewitt* or *Thompson* as relevant authority where the question was whether an

employee had a property interest in his or her job. Moreover, it is extremely difficult to understand how the "explicitly mandatory language" standard can be reasonably applied in the context of a property interest question. In the context of a prison situation where the security of the prison is obviously a very important value, it is clear how the "explicitly mandatory language" standard could serve a useful function. In a prison context it is extremely important that prison authorities have the power to maintain discipline and order. It was understandable that this Court would hold in *Hewitt* and *Thompson* that a prisoner claiming that he or she has an interest which requires the protections of the Due Process Clause (a "liberty" interest) meet the highest possible standard.

When the issue does not involve the rights of prison inmates but rather the question of whether a document – whether it be a statute, contract, personnel policy or court order – conveys a property interest, it is not at all clear what purpose the "explicitly mandatory language" standard serves. The Seventh Circuit Court of Appeals has never justified, explained, or even acknowledged that it imported the "explicitly mandatory language" standard from the prison context to the property interest context.

The Petitioners are not the first to question the application of the "explicitly mandatory language" standard to property interest questions. In his dissenting opinion in *Miller v. Crystal Lake Park Dist., supra,* Judge Cudahy stated:

> The majority cites *Thompson*'s requirement of "explicitly mandatory language" in statutes or regulations to establish a legitimate claim of

> entitlement. But *Thompson* offers little help, because it concerned a liberty interest in a prison context, and that analysis can differ considerably from the treatment of property interests, especially those arising in non-prison settings.

Id., 47 F.3d at 870 (Cudahy, J., dissenting) (citing *Jago v. Van Curen*, 454 U.S. 14, 18 (1981)).

The Seventh Circuit Court of Appeals' use of the "explicitly mandatory language" standard in property interest cases is harmful in a number of ways. First, it conflicts with this Court's jurisprudence that state law determines property interests. Secondly, it represents the imposition, unauthorized by this Court, of a federally created standard upon state law the effect of which is to undermine state law. It is particularly troublesome that the Seventh Circuit Court of Appeals imported the standard from an entirely different context (prisoners' rights) without explanation or justification.

Third, the use of the "explicitly mandatory language" standard in property interest cases thwarts the creation of a property interest even when the words of a document clearly create one. It prevents individuals from relying on unambiguous written promises. The use of the "explicitly mandatory language" standard in the property interest context leads to results which are unjust and, sometimes, absurd. It is unjust and absurd for a court to hold that a court order cannot be relied on unless it contains language stating that everything stated in the order is mandatory. Court orders are by definition mandatory.

Finally, it is both important and ironic that this Court has recently rejected the "explicitly mandatory language"

standard in the only context in which it ever applied, that of prisoners' rights. In *Sandin v. Conner*, 115 S. Ct. 2293 (1995), this Court found that prisoners were using the "explicitly mandatory language" standard to seek to extend prisoners' rights beyond those required to protect against hardships atypical to the prison environment. *Id.* at 2300. The Court determined that the standard was no longer appropriate to use to determine liberty interests of inmates. *Id.*

Thus, the Seventh Circuit Court of Appeals is using a standard to dismiss property interest cases that was never intended to be used in such situations, and that has now been rejected by this Court in the only situation in which it was previously applied. This Court should grant the requested Writ to make clear that the "explicitly mandatory language" standard does not apply to questions of property interests in employment. In *Sandin*, this Court rejected the standard in the prison context because it was difficult to apply and tended to produce anomalous results. *Id.* at 2300 n.5. The case at bar shows that use of this standard in the employment law context produces even more anomalous results.

CONCLUSION

This case raises important questions of federalism and judicial integrity. Without resolution of these questions, federal courts in the Seventh Circuit and possibly in other circuits will continue to undermine state law and impose a defunct federal standard in cases in which it

was never intended to be applied. The Petitioners therefore respectfully pray that this Court grant the Writ of Certiorari they request, so that these questions may be resolved.

Respectfully submitted,

ELIZABETH ADELMAN
Counsel of Record

LYNN ADELMAN

Counsel for Petitioners

ADELMAN, ADELMAN & MURRAY, S.C.
308 East Juneau Avenue
Milwaukee, Wisconsin 53202
(414) 225-2920

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2592

JOAN FLYNN, ROBERT BERTERMANN,
EVA CHRISTOPHERSON, et al.,

Plaintiffs-Appellants,

v.

DENNIS KORNWOLF, STEPHEN A. SIMANEK,
in their individual capacities and
RACINE COUNTY, a municipal corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 94 C 908 – John W. Reynolds, *Judge.*

ARGUED DECEMBER 4, 1995 – DECIDED MAY 15, 1996

Before BAUER, DIANE P. WOOD and EVANS, *Circuit Judges.*

BAUER, *Circuit Judge.* The plaintiffs, former part-time bailiffs in Racine County, Wisconsin, brought suit under 42 U.S.C. § 1983, claiming that the defendants violated their due process rights by demoting them and terminating their employment without cause. The district court granted the defendants' motions to dismiss. We affirm.

BACKGROUND

We accept as true the facts alleged in the plaintiffs' complaint. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir. 1996). The plaintiffs worked as part-time bailiffs in Racine County. Their duties primarily involved the care and custody of jurors. Before 1992, they worked more than 600 hours per year. In the summer of 1992, Dennis Kornwolf, the county executive, and Stephen Simanek, a Racine County circuit court judge and the chief judge of the state's Judicial District II, realized that any county employee who worked more than 600 hours per year became entitled to pension benefits from the Wisconsin Retirement System. To save the county the expense of paying $.36 per hour for the plaintiffs' pension benefits, Kornwolf and Simanek decided to fire the plaintiffs and replace them with bailiffs who would work less than 600 hours per year. In September 1992, Kornwolf laid off the plaintiffs, despite their willingness to pay for their own pension benefits in order to keep their jobs.

In January 1993, the county rehired most of the plaintiffs as "court attendants" rather than "bailiffs." The plaintiffs viewed this as a demotion. Two months later, the Racine County circuit court judges signed an "order appointing court attendants" through the end of the year. The order limited the court attendants' work to 599 hours per year. Although the plaintiffs worked fewer hours than before, they alleged that they actually did more work as a result of a new county policy assigning one bailiff per jury rather than two. Because of this policy and other changes in the conditions of their employment, several plaintiffs quit their jobs. Despite the County's

opposition, those plaintiffs applied for and received pension benefits. In May 1993, Simanek told those plaintiffs still employed as court attendants that they would be discharged and rehired as Kelly Temporary Services employees.

In August 1994, the plaintiffs filed this suit pursuant to 42 U.S.C. § 1983, alleging that Simanek and Kornwolf, acting in their individual capacities, demoted the plaintiffs and terminated their employment without cause, notice, or a hearing in violation of Wisconsin laws setting forth employment rules for county civil service. *See* Wis. Stat. §§ 63.01 to 63.17. The plaintiffs contended that Simanek and Kornwolf thus deprived them of their constitutional right to due process under the Fourteenth Amendment. The plaintiffs also sued Racine County, claiming that it violated their due process rights by excluding them from civil service protections against demotion or termination without cause, notice, or a hearing. The district court granted the defendants' motions to dismiss because the plaintiffs failed to state a due process property interest in their employment, and therefore failed to show any violation of their constitutional or civil rights. We review *de novo* the district court's dismissal for failure to state a claim. *Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995).

ANALYSIS

I. *Property Interest*

If the plaintiffs had property rights in their employment, the defendants could not deprive them of those

rights without adequate due process. *See Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1405 (7th Cir. 1994), *citing Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). *See also Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). Whether the plaintiffs had a substantive property interest in their jobs is a question of state law. *Fittshur*, 31 F.3d at 1405. The relevant inquiry under Wisconsin law turns on whether the employment is at-will. *Id; Listenbee v. City of Milwaukee*, 976 F.2d 348, 351 (7th Cir. 1992). Employment at will, in which the employee has no property interest, is the rule. *Warzon*, 60 F.3d at 1240. On the other hand, an employee terminable only for cause has a property interest in his employment. *See Listenbee*, 976 F.2d at 351.

a. *Racine County Ordinance*

The plaintiffs first assert that they were civil servants terminable only for cause because Racine County inadvertently extended civil service coverage to all county employees by passing an overbroad county ordinance, Racine County Code §§ 17-1 *et seq*. Generally, once a county establishes a civil service commission, the county must give civil service protections to all county employees. *See* Wis. Stat. § 63.03(1). However, a county may establish a civil service commission for the selection of deputy sheriffs and limit civil service protections to deputy sheriffs. *See* Wis. Stat. § 59.21(8) (providing that if a civil service commission is decided upon for the selection of deputy sheriffs, the general rule requiring universal civil service coverage for county employees does not apply). The plaintiffs contend that Racine County Code § 17-21, by establishing a civil service commission for the

sheriff's *department*, rather than just for the deputy sheriffs, extended civil service coverage to all county employees.

This argument fails for several reasons. First, it is inconsistent with a plain reading of Racine County Code § 17-21, which establishes a civil service commission for the sheriff's department "pursuant to W.S.A. §§ 59.21 and 63.01 et seq." As we already have noted, section 59.21(8) allows counties to create civil service commissions but limit civil service coverage to deputy sheriffs. The ordinance's reference to section 59.21 indicates that the county intended to limit civil service protections to deputy sheriffs.

Furthermore, the ordinance's repeated references to the position of deputy sheriff show that it extended civil service protections only to deputy sheriffs. For example, the ordinance requires that each member of the civil service commission be "highly knowledgeable of the duties and responsibilities of the deputy sheriff position," and "familiar with the important qualifications needed to become a successful deputy." Similarly, those sections of the ordinance addressing the application process and requirements for covered positions, as well as the preparation of and hiring from the eligibility list, all refer to the position of deputy sheriff. Nowhere does the ordinance state that all department employees, let alone all county employees, are covered by its civil service protections. In short, the mere fact that the ordinance uses the word "department" does not convert it into a county-wide civil service provision.

b. *Court Order*

Next, the plaintiffs contend that the March 1993 court order appointing them court attendants gave them a property interest in their employment. The order lists the plaintiffs' names, defines their authority, and states that the order expires on December 31, 1993. The plaintiffs argue that the order appointed them for a definite term, and therefore they had a "legally enforceable expectancy" in their employment and could be terminated only for cause.

The Wisconsin Supreme Court has held that "[a]bsent civil service regulations or laws, or a contract or collective bargaining agreement, a [public] employee is an employee at will and has no property interest in employment." *Vorwald v. School Dist. of River Falls,* 167 Wis.2d 549, 557, 482 N.W.2d 93, 96, *cert. denied,* 506 U.S. 941 (1992). The plaintiffs contend that, like civil service regulations or laws, or contracts or collective bargaining agreements, the court order appointing them abrogated Wisconsin's general rule of at-will employment and made their employment terminable only for cause. They assert that the order gave them a "legitimate claim of entitlement" to their employment during its effective dates, and that they therefore had a property interest in their jobs.

The plaintiffs' argument fails. Although the court order appointing them to their positions did contain an expiration date, it "place[d] no substantive restriction on the county's [or the appointing judges'] authority to terminate" the plaintiffs before it expired. *See Warzon,* 60 F.3d at 1240. Nowhere does the order state in "explicitly mandatory language" that the appointing judges have

limited discretion to terminate the plaintiffs' employment at the judges' will. *See Fittshur,* 31 F.3d at 1406. Absent such language, the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property interest that would trigger due process protections.

Because neither Racine County Ordinance § 17-1 *et seq.* nor the court order gave the plaintiffs a property interest in their employment, the defendants were free to terminate them "whenever and for whatever reasons [they] so desire[d]." *Wilcox v. Niagara of Wisconsin Paper Corp.*, 965 F.2d 355, 358 (7th Cir. 1992). The district court properly dismissed the plaintiffs' complaint for failure to state a claim.[1]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] Because we affirm the district court's dismissal, we need not address the plaintiffs' argument that the district court abused its discretion in staying all discovery pending resolution of the defendants' motions to dismiss.

Copy mailed to attorneys for parties by the Court pursuant to Fed. R. Civ. P.77(d). 6-1-95

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, BERNARD WYNHOFF, JOHN GRECO, and JOSEPH PORCARO,

Plaintiffs,

v.

DENNIS KORNWOLF, STEPHEN SIMANEK and RACINE COUNTY,

Defendants.

Civil Action
No. 94-C-0908

DECISION AND ORDER
GRANTING MOTIONS TO DISMISS

(Filed Jun. 1, 1995)

Plaintiff, formerly part-time bailiffs in Racine County, allege that defendants Dennis Kornwolf ("Kornwolf") and Judge Stephen Simanek ("Judge Simanek") demoted and discharged them in order to avoid paying them pension benefits. Plaintiffs bring suit under 42 U.S.C. § 1983, claiming that defendants violated their due process rights

as civil service employees against being demoted or terminated without cause. Plaintiffs seek reinstatement, lost wages and pension benefits, compensatory damages, and $1 million in punitive damages from Kornwolf. Defendants have filed motions to dismiss, and, for reasons set forth below, the motions shall be granted. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

I. Factual Allegations

The thirteen plaintiffs were employed by Racine County as part-time bailiffs. They each worked in excess of 600 hours per year, and their job duties involved the care and custody of jurors in the circuit courts of Racine County. (Am. Compl. ¶¶ 8-9.) Plaintiffs were supervised by the clerk of court but appointed by the judges of the Racine County Circuit Court by court order. The appointment extended from December 19, 1991 through January 31, 1993. (*Id.*/Ex. D.)

Plaintiffs allege that in the summer of 1992, Kornwolf and Judge Simanek decided they could save money for the County if they fired the plaintiffs and replaced them with bailiffs who would work fewer than 600 hours per year, thus enabling the County to avoid paying $.36 per hour to cover the plaintiffs' state-mandated pension benefits. In August 1992, Judge Simanek placed advertisements in local newspapers for part-time bailiffs willing to work no more than 540 hours per year. (*Id.*/Ex. A.) Kornwolf allegedly vowed that as long as he was county executive, there would be no retirement benefits for part-time employees. (*Id.* ¶ 12.) In September 1992, Kornwolf

laid off the plaintiffs, even though they offered to pay their own pension benefits to retain their jobs.

In January 1993, most of the plaintiffs were rehired as "court attendants" rather than "bailiffs," which plaintiffs viewed as a demotion. In March 1993, the Racine County circuit court judges signed an "order appointing court attendants" through the end of 1993. The court order limited plaintiffs' work to 599 hours per year. Plaintiffs allege that despite working fewer hours, they were assigned more work, because the county instituted a new policy of assigning one bailiff per jury rather than two. (*Id.* ¶ 17.) In addition, plaintiffs could no longer receive travel reimbursement or a uniform allowance. As a result of these changes in conditions, several of the plaintiffs quit their jobs, which they allege constituted constructive discharge. They applied for and received pension benefits, despite the County's opposition. (*Id.* ¶ 19.) In May 1993, Judge Simanek informed the plaintiffs still on the job that they would be discharged and rehired as Kelly Temporary Services employees.

In August 1994, plaintiffs filed this lawsuit, alleging that Judge Simanek and Kornwolf, acting in their individual and official capacities, demoted and terminated them without cause, notice, or a hearing, and that they conspired to do so, in violation of Chapter 63 of the Wisconsin Statutes, which sets forth employment rules for county and city civil service. Plaintiffs assert that violations of this chapter resulted in the deprivation of their constitutional rights to due process under the Fourteenth Amendment. Plaintiffs further allege that Racine County violated their due process rights by transgressing the

court orders signed by the Racine County circuit court judges setting forth plaintiffs' terms of appointment.

II. Analysis

A complaint should not be dismissed for failure to state a claim unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When considering motions to dismiss, this court must accept as true the plaintiff's factual allegations and must draw all reasonable inferences from the pleadings in favor of the plaintiff. *Gillman v. Burlington N. R.R.*, 878 F.2d 1020, 1022 (7th Cir. 1989).

Defendants have moved the court to dismiss plaintiffs' suit chiefly on the ground that plaintiffs did not have a constitutional due process property interest in their employment as bailiffs.[1] The court agrees that plaintiffs have failed to state a property interest.

A. Due Process Property Interest

Plaintiffs contend they possessed a property interest in their employment as bailiffs of which defendants deprived them without due process of law. The existence of a substantive property interest in public employment is a question of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). When asked to decide whether employees

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[1] In addition, defendants Simanek and Kornwolf argue that they are qualifiedly immune from damages, but the court need not address this claim.

have a property interest in their jobs, Wisconsin courts have "generally resolved the matter by providing a simple yes or no answer based on whether the employment is at-will or for cause." *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1405 (7th Cir. 1994). The Wisconsin Supreme Court has held: "Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment." *Vorwald v. School Dist. of River Falls*, 167 Wis. 2d 549, 557, 482 N.W.2d 93 (1992).

Plaintiffs assert that they have a property interest in their employment on two fronts: (1) civil service laws, and (2) court order. The court shall assess each of these claims in turn.

1. Civil Service Laws

While there is no state statute that expressly provides plaintiffs with civil service or "for cause" protection, plaintiffs contend that they are civil service employees entitled to civil service protection because Racine County passed an overbroad ordinance, Racine County Code §§ 17-1 *et seq.* Racine County Code § 17-21 declares: "There is hereby established a civil service commission for the sheriff's department with duties, functions and authority as herein set forth pursuant to W.S.A. §§ 59.21 and 63.01 et seq." Plaintiffs argue that by passing this ordinance, the County inadvertently created civil service protection for *all* county employees because the ordinance goes beyond the authority of the County pursuant to Wisconsin Stat. § 59.21(8)(d), which states, in pertinent

part: "The civil service provisions of this section shall apply only to such deputies or traffic patrolmen who are regularly employed by the county or sheriff."

The court does not accept plaintiffs' contention that Racine County Code §§ 17-1 *et seq.* creates civil service protection for all county employees. Wisconsin Stat. § 59.21 empowers a county to establish civil service protection for sheriff's department personnel. Wisconsin Stat. §§ 63.01 *et seq.* enumerate rules regarding county-wide civil service, which counties are empowered to establish pursuant to Wis. Stat. § 59.07(20). In passing Racine County Code §§ 17-1 *et seq.*, the County exercised its discretion and authority to establish civil service protection for sheriff's personnel but not for all county employees. Even if plaintiffs are correct that Racine County Code §§ 17 *et seq.* goes beyond the power of the county to establish civil service protection for sheriff's personnel under Wis. Stat. § 59.21(8), that would merely be an argument against extending civil service protection to non-deputy sheriffs within the sheriff's department. But it does not support plaintiffs' argument that all county employees are entitled to civil service protection, in the absence of the County's express intent to create such protection pursuant to Wis. Stat. § 59.07(20).[2]

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[2] Wisconsin Stat. § 59.07(20) states in pertinent part:

> The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:
>
> . . . .
>
> (20) Civil service system. (a) Establish a civil service system of selection, tenure and status, and the

Plaintiffs are not protected by civil service laws where Racine County has not expressly provided for such protection.

2. Court Order

In addition, plaintiffs maintain that they have a property interest based on a court order appointing civilian bailiffs for a specific period of time, which was signed by the judges of the Racine County circuit court. The "order appointing civilian bailiffs" lists plaintiffs' names and limitations of their authority, and states: "The order is effective immediately this date, December 19, 1991 and shall expire January 31, 1993." The order was established pursuant to Wis. Const. art. VII, § 8, which states *inter alia* that "[t]he circuit court may issue all writs necessary in aid of its jurisdiction," and Wis. Stat. § 753.10, which states *inter alia* that "[e]very officer attending court upon the order of the presiding judge . . . shall be paid out of the county treasury." Plaintiffs argue that the court order created a property interest in their employment as bailiffs.

This argument is not persuasive. As noted previously, the Wisconsin Supreme Court has held that employment at will for public employees is the rule in Wisconsin, absent civil service regulations or laws, a collective bargaining agreement, or a contract. *Vorwald v.*

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system may be made applicable to all county personnel, except the members of the board, constitutional officers and members of boards and commissions.

School Dist. of River Falls, 167 Wis. 2d 549, 557, 482 N.W.2d 93 (1992). The "court order appointing bailiffs" constitutes neither a civil service law nor a collective bargaining agreement. Plaintiffs were not civil service employees, as explained above, nor were they members of a union or parties to a collective bargaining agreement. Nor was the court order a contract. Unlike cases in which plaintiffs have argued that they were employed by virtue of an implied contract,[3] plaintiffs in this action have made no argument that they had an implied contract or any type of contract. Plaintiffs do not use the word "contract" in their complaint, filed August 15, 1994, nor in their amended complaint, filed October 11, 1994. In their response brief to defendants' motions to dismiss, plaintiffs state that "[a] court order in Wisconsin is a binding document, more venerable than a contract" (Pls.' Resp. Br. at 18), which further highlights plaintiffs' position that they did not have a contract. Without any evidence or assertion by plaintiffs that an express or implied contract existed, the court can only conclude that one did not. *Harris v. City of Auburn*, 27 F.3d 1284, 1286 (7th Cir. 1994). Thus, plaintiffs did not have a property interest by contract.

B. Substantive Due Process

Plaintiffs amended their complaint in order to add a cause of action based on Fourteenth Amendment substantive due process. But this claim fails as well. Plaintiffs

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[3] *See, e.g., Garvey v. Buhler*, 146 Wis. 2d 281, 430 N.W.2d 616 (1988).

argue that their right to substantive due process was violated because their termination was arbitrary and capricious. But this is not enough to state such a violation because "[a] claim based on substantive due process must be based on the deprivation of an underlying protected life, liberty or property interest." *Zorzi v. County of Putnam*, 30 F.3d 885, 894 (7th Cir. 1994). Plaintiffs do not assert a life or liberty interest, and, as explained heretofore, plaintiffs fail to state facts constituting a property interest deprivation. In the absence of a property interest, a plaintiff may be terminated for arbitrary and capricious reasons. *Id.* at 895.

C. Civil Conspiracy

Finally, plaintiffs allege that defendants Kornwolf and Judge Simanek conspired to violate their Fourteenth Amendment rights, pursuant to 42 U.S.C. § 1983. Plaintiffs assert that Kornwolf and Judge Simanek "agreed to terminate Plaintiffs from Racine County employment" (Compl. ¶ 20) and that these two defendants "conspired and combined to demote and dismiss Plaintiffs without cause, notice or hearing." (Compl. ¶ 26.) To adequately state a claim for civil conspiracy under § 1983, a plaintiff must allege that defendants directed themselves toward an unconstitutional action by virtue of a mutual understanding that suggests a meeting of the minds. *Kunik v. Racine County*, 946 F.2d 1574, 1580 (7th Cir. 1991). Because plaintiffs' constitutional rights were not violated, it cannot be said that Kornwolf and Judge Simanek conspired toward an unconstitutional action.

III. Conclusion

IT IS THEREFORE ORDERED that the motion to dismiss filed by Dennis Kornwolf and Racine County is GRANTED.

IT IS FURTHER ORDERED that Judge Stephen Simanek's motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that this case is dismissed.

Dated at Milwaukee, Wisconsin, this 1st day of June, 1995.

UNITED STATES DISTRICT COURT

By /s/ John W. Reynolds
John W. Reynolds
Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JOAN FLYNN, et al.,

V.

DENNIS KORNWOLF, et al.

JUDGMENT IN A CIVIL CASE

(Filed Jun. 1, 1995)

CASE NUMBER: 94-C-908

[ ] **Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.**

[X] **Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.**

IT IS ORDERED AND ADJUDGED that the defendants motions to dismiss are granted and this action is hereby DISMISSED.

June 1, 1995
Date

SOFRON B. NEDILSKY
Clerk

Copy mailed to Attorneys for parties by the court pursuant to rule 87(D) federal rules of civil procedure.

/s/ Rita Zvers
(By) Deputy Clerk

STATE OF WISCONSIN CIRCUIT COURT
RACINE COUNTY

ORDER APPOINTING CIVILIAN BAILIFFS

Pursuant to the Racine County Circuit Courts' inherent power to make rules and orders necessary to properly perform their function and,

Pursuant to Section 8, Article VII of the Wisconsin Constitution and,

Pursuant to Wisconsin Stats. Sec. 753.10,

The Racine County Circuit Court Judges order:

1. The following named individuals are appointed as civilian bailiffs to attend upon the Racine County Courts:

Robert Bertermann
Eva Christopherson
Joan M. Flynn
John Greco
Helen Hess
Paul Rosenquist
Florence Stupar
Bernard J. Wynhoff
Jay Wildfong
Ed Bowman
Shirley Dandeneau
Bonnie Fuller
Sally Guzek
Joe Porcaro
Margaret Schmaling

2. The authority of the above-named individuals is limited to:

a) The administration of case flow,

b) Taking charge of juries, and

c) Any other duties specifically requested by the presiding judge.

3. The above-appointed bailiffs are specifically not authorized to take any individual into custody; not authorized to physically evict any individual from the courts; and not authorized to guard criminal defendants.

4. The order is to be effective for a period of sixty (60) day from the date of signature.

5. The order is, however, retroactive to January 1, 1991.

BY THE COURT:

Dated: 5/16/91

/s/ Gerald P. Ptacek
Honorable Gerald P. Ptacek
Branch I

Dated: 5-15-91

/s/ Stephen A. Simanek
Honorable Stephen A. Simanek
Branch II

Dated: _____

_____
Honorable Jon B. Skow
Branch III

Dated: 5-15-91

/s/ Emmanuel J. Vuvunas
Honorable Emmanuel J. Vuvunas
Branch IV

Dated: 5/15/91

/s/ Dennis J. Barry
Honorable Dennis J. Barry
Branch V

Dated: 5/15/91

/s/ Wayne J. Marik
Honorable Wayne J. Marik
Branch VI

Dated: 5/15/91

/s/ Nancy E. Wheeler
Honorable Nancy E. Wheeler
Branch VII

Dated: 15 MAY 91

/s/ Dennis J. Flynn
Honorable Dennis J. Flynn
Branch VIII

STATE OF WISCONSIN CIRCUIT COURT
RACINE COUNTY

ORDER APPOINTING CIVILIAN BAILIFFS

Pursuant to the Racine County circuit Courts' inherent power to make rules and orders necessary to properly perform their function and,

Pursuant to Section 8, Article VII of the Wisconsin Constitution and,

Pursuant to Wisconsin Stats. Sec. 753.10,

The Racine County Circuit Court Judges order:

1. The following named individuals are appointed as civilian bailiffs to attend upon the Racine County Courts:

Robert Bertermann	Jay Wildfong
Eva Christopherson	Ed Bowman
Joan M. Flynn	Shirley Dandeneau
John Greco	Bonnie Fuller
Helen Hess	Sally Guzek
Paul Rosenquist	Joe Porcaro
Florence Stupar	Bernard J. Wynhoff

2. The authority of the above-named individuals is limited to:

a) The administration of case flow,

b) Taking charge of juries, and

c) Any other duties specifically requested by the presiding judge.

3. The above-appointed bailiffs are specifically not authorized to take any individual into custody; not authorized to physically evict any individual from the courts; and not authorized to guard criminal defendants.

4. The order is effective immediately this date, December 19, 1991 and shall expire January 31, 1993.

BY THE COURT:

Dated: Jan. 9, 1992
/s/ Gerald P. Ptacek
Honorable Gerald P. Ptacek
Branch I

Dated: 12-23-91
/s/ Stephen A. Simanek
Honorable Stephen A. Simanek
Branch II

Dated: Jan. 7, 1992
/s/ Emmanuel J. Vuvunas
Honorable Emmanuel J. Vuvunas
Branch IV

Dated: 12/26/91
/s/ Dennis J. Barry
Honorable Dennis J. Barry
Branch V

Dated: Jan. 7, 1992
/s/ Wayne J. Marik
Honorable Wayne J. Marik
Branch VI

Dated: Jan. 9, 1992
/s/ Nancy E. Wheeler
Honorable Nancy E. Wheeler
Branch VII

Dated: 9 JAN 92
/s/ Dennis J. Flynn
Honorable Dennis J. Flynn
Branch VIII

Dated: 21 JAN 92
/s/ Allan B. Torhorst
Honorable Allan B. Torhorst
Branch IX

STATE OF WISCONSIN CIRCUIT COURT
RACINE COUNTY

ORDER APPOINTING COURT ATTENDANTS

Pursuant to the Racine County Circuit Courts' inherent power to make rules and orders necessary to properly perform their function and,

Pursuant to Section 8, Article VII of the Wisconsin Constitution and,

Pursuant to Wisconsin Stats. Sec. 753.10,

The Racine County Circuit Court Judges order:

1. The following named individuals are appointed as court attendants to attend upon the Racine County Courts:

George Janosik	Sharon Mullen	Robert Bertermann
Maureen Eckert	John Swan	James Vernon
Bernice Christensen	Donald Bostick	Jay Wildfong
Eva Christopherson	Ed Bowman	Mickey Turkowski
John Greco	Bonnie Fuller	Judy Winsall
Joe Pocaro	Bernard J. Wynhoff	Greta Andersen
Janet Gergen	Paul Rosenquist	Sally Guzek

2. The authority of the above-named individuals is limited to:

a) The administration of case flow,

b) Taking charge of juries, and

c) Any other duties specifically requested by the presiding judge.

3. The above-appointed court attendants are specifically not authorized to take any individual into custody; not authorized to physically evict any individual from the courts; and not authorized to guard criminal defendants.

4. Court Attendants' work shall be limited to 599 hours of work in any 12 month period.

5. This order expires on 12-31-93.

BY THE COURT:

Dated: 3/18/93

/s/ Gerald P. Ptacek
Honorable Gerald P. Ptacek
Branch I

Dated: 3/18/93

/s/ Stephen A. Simanek
Honorable Stephen A. Simanek
Branch II

Dated: 3/18/93

/s/ Emily S. Mueller
Honorable Emily S. Mueller
Branch III

Dated: 3-29-93

/s/ Emmanuel J. Vuvunas
Honorable Emmanuel J. Vuvunas
Branch IV

Dated:
MARCH 19, 1993

/s/ Dennis J. Barry
Honorable Dennis J. Barry
Branch V

Dated:
March 18, 1993

/s/ Wayne J. Marik
Honorable Wayne J. Marik
Branch VI

Dated: 3-19-93

/s/ Nancy E. Wheeler
Honorable Nancy E. Wheeler
Branch VII

Dated:
18 MARCH 1993

/s/ Dennis J. Flynn
Honorable Dennis J. Flynn
Branch VII

Dated: 3-18-93

/s/ Allan B. Torhorst
Honorable Allan Pat Torhorst
Branch IX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, BERNARD WYNHOFF, JOHN GRECO, and JOSEPH PORCARO,

Plaintiffs,

Case No. 94-C-0908

v.

DENNIS KORNWOLF, and STEPHEN SIMANEK, in their individual capacities, and RACINE COUNTY, a municipal corporation,

Defendants.

AMENDED COMPLAINT

Plaintiffs, by their attorneys, Adelman, Adelman & Murray, by Elizabeth Adelman, allege as follows:

JURISDICTION AND VENUE

1. This is a civil action in which Plaintiffs seek reinstatement to their jobs as bailiffs with Defendant Racine County as well as back pay and other damages and a permanent injunction restraining all Defendants from terminating the employment of the Plaintiffs;

2. This action arises under 42 U.S.C. §1983 and the 14th Amendment to the United States Constitution;

3. This Court's jurisdiction is invoked under 28 U.S.C. §§1331 and 1343(a)(4);

4. Plaintiffs Joan Flynn, Robert Bertermann, Eva Christopherson, Sally Guzek, Paul Rosenquist, Jay Wildfong, Ed Bowman, Shirley Dandeneau, Bonnie Fuller, Helen Hess, Bernard Wynhoff, John Greco and Joseph Porcaro are residents of Racine County, Wisconsin, and were employed by Racine County as bailiffs until 1993.

5. Defendant Dennis Kornwolf is the County Executive of Racine County, Wisconsin, and is sued in his individual capacity for acts done under color of law;

6. Defendant Stephen Simanek is a Circuit Court Judge in Racine County, Wisconsin, and is the Chief Judge of Judicial District II of the State of Wisconsin. He is sued in his individual capacity for acts done under color of law;

7. Defendant Racine County is a municipal corporation incorporated under the laws of the State of Wisconsin.

FIRST CAUSE OF ACTION

8. Plaintiffs were employed by Defendant Racine County as part-time bailiffs. Their duties primarily involved the care and custody of jurors, from checking jurors into court, excusing some jurors from duty, accompanying jurors during recesses from deliberations, carrying messages from jurors to the judge, arranging for meals, accommodations and transportation of jurors and

otherwise assuring the sanctity of trial by jury in the Circuit Courts of Racine County;

9. Prior to 1992 Plaintiffs worked as bailiffs for more than 600 hours per year;

10. During the summer of 1992, Defendants Dennis Kornwolf in his position as the Racine County Executive and Stephen Simanek, in his position as the Chief Judge of Racine County Circuit Court, realized that *once any* county employee, including the bailiffs, works in excess of 600 hours per year, that employee must be covered by and receive pension benefits from the Wisconsin Retirement System;

11. In August 1992, Stephen Simanek acting as Chief Judge, placed an advertisement in the *Racine Journal Times* and *Burlington Standard* for bailiffs to replace the Plaintiffs. (See attached advertisement, Exhibit A);

12. In August or September, 1992, County Executive Dennis Kornwolf met with the Clerk of Circuit Courts and told him he intended to lay the bailiffs off because it would cost the county 36 cents per hour to cover the bailiffs under the pension plan of the Wisconsin Retirement System. Dennis Kornwolf also told the Clerk of Circuit Courts that so long as he was county executive there would be no retirement benefits for part-time employees;

13. In August or September, 1992, a delegation of three (3) bailiffs met with County Executive Dennis Kornwolf and offered to take a cut in pay so that pension plan coverage for the bailiffs would not cost the county any money. Dennis Kornwolf refused the offer. (see letter

from bailiffs offering to pay the pension plan coverage attached as Exhibit B);

14. In September, 1992, County Executive Dennis Kornwolf caused the bailiffs to be laid off and leave their employment;

15. In October, 1992, Plaintiffs sent a letter to County Executive Dennis Kornwolf again offering to take a cut in pay. Plaintiffs received no answer;

16. Plaintiffs sought unemployment compensation. Defendant Racine County, at the direction of County Executive Dennis Kornwolf, pursued a meritless contest, claiming the bailiffs were independent contractors or state, nor county employees. The administrative law judge found that Racine County's arguments were "specious" and "outrageous," without a "shred of evidence" and a "shameful compounding of the ill-use of the more vulnerable county employees" and awarded benefits. (Unemployment Compensation decision attached as Exhibit C);

17. In January, 1993, Plaintiffs were recalled to work, however, demoted from "bailiffs" to "court attendants." The county kept the replacement workers hired pursuant to the advertisement set forth above in Paragraph 4, resulting in twice the number of people and fewer hours of employment for each bailiff. In the past, two (2) bailiffs were assigned to each jury. In January, only one bailiff was assigned to each jury, resulting in double the work and significantly fewer hours for each bailiff. Defendant Racine County, under the direction of

County Executive Dennis Kornwolf, attempted to retroactively terminate travel reimbursement and terminated the uniform allowance which had been provided previously;

18. The demotion from "bailiff" to "court attendant," the changes in the terms of employment and the limitation of only one bailiff for each jury resulted in a constructive discharge. Due to these changes, some of the Plaintiffs quit work for Racine County;

19. Thereafter, some of the Plaintiffs applied to the State Retirement System to receive their pensions. Racine County opposed this. Again, Plaintiffs won and received notice that the bailiffs were required to be included in the Wisconsin Retirement System. Racine County was required to pay to the Wisconsin Retirement System the required pension contributions which Racine County had not paid;

20. Dennis Kornwolf and Stephen Simanek agreed to terminate Plaintiffs from Racine County employment;

21. In May, 1993, Plaintiffs were told to attend a meeting with Judge Stephen Simanek acting in his official capacity. At the meeting, Stephen Simanek discharged Plaintiffs and told Plaintiffs that in the future they would be employed as Kelly Temporaries;

22. Plaintiffs have a property right to Racine County employment as bailiffs in that Ch. 63 Wis. Stats. grants protection to all county employees, with exceptions not relevant here, against demotion or discharge except upon a showing of cause, after notice and hearing when the County has a civil service commission. Racine County has a civil service commission;

23. The above actions demoting and then terminating the Plaintiffs without cause, without notice and without a hearing violate Chapter 63 of the Wisconsin Statutes and deprive Plaintiffs of rights secured by the Constitution and laws of the United States, that is, 42 U.S.C. §1983 and the 14th Amendment.

24. In acting to demote and then discharge Plaintiffs, County Executive Dennis Kornwolf acted willfully, unlawfully, maliciously and in wanton disregard for the rights of Plaintiffs.

SECOND CAUSE OF ACTION

25. Plaintiffs reallege paragraphs 1-24 as though fully set forth herein.

26. Defendants Dennis Kornwolf and Stephen Simanek conspired and combined to demote and dismiss Plaintiffs without cause, notice or hearing, which they knew or should have known violated Ch. 63 of the Wisconsin Statutes and deprived Plaintiffs of rights secured by the Constitution and laws of the United States, that is, 42 USC §1983 and the 14th Amendment.

THIRD CAUSE OF ACTION

27. Plaintiffs reallege paragraph 1-26 as though fully set forth herein.

28. Racine County, by its county board, enacted an ordinance codified as Chapter 17 of the Racine County Ordinances. This ordinance establishes a civil service

commission, but purports to limit its scope to the Sheriff's Department, thereby excluding Plaintiffs from its due process protections;

29. Section 63.03 Wis. Stats. requires civil service protection be awarded to all county employees, with exceptions not relevant here, when a county appoints a civil service commission;

30. Racine County's illegal exclusion of Plaintiffs from civil service protections against demotion or dismissal only for cause, upon notice and after a hearing, caused the illegal demotion and dismissal of Plaintiffs;

31. Racine County's illegal exclusion of Plaintiffs from civil service protections against demotion or dismissal only for cause, upon notice after a hearing violates the 14th Amendment to the United States constitution and 42 USC §1983;

32. Racine County is also liable for these violations of 42 U.S.C. §1983 because the actions taken to demote and dismiss Plaintiffs were taken by Dennis Kornwolf in his capacity as county executive and Stephen Simanek in his capacity as chief judge. Racine County gave these Defendants final authority to make these decisions regarding the bailiffs, now known as court attendants.

FOURTH CAUSE OF ACTION

33. Plaintiffs reallege paragraphs 1-21 and 24 as though fully set forth herein;

34. On or about December 19, 1991, Plaintiffs were appointed as bailiffs for a definite term from December

19, 1991, through January 31, 1993. (See attached order Appointing Civilian Bailiffs, Exhibit D);

35. On or about March 18, 1993, all Plaintiffs except Joan Flynn and Shirley Dandaneau were again appointed as bailiffs for a definite term until December 31, 1992 (See attached Order Appointing Court Attendants, Exhibit E);

36. Despite the above two (2) Orders establishing definite terms for employment, Defendants Dennis Kornwolf and Stephen Simanek laid off, demoted and then terminated Plaintiffs during the definite terms of employment.

37. The lay off, demotion and termination are arbitrary and capricious, being without a rational basis;

38. There are no adequate state law remedies to provide relief against the arbitrary lay off, demotion and termination;

39. The arbitrary lay off, demotion and termination were done with deliberate indifference to Plaintiffs' rights and violate 42 U.S.C. §1983 and substantive due process as set forth in the 14th Amendment to the United States Constitution.

WHEREFORE, Plaintiffs request the following relief:

A. Preliminary and permanent injunctions reinstating Plaintiffs as bailiffs employed by Racine County under the same terms of employment as existed prior to September, 1992.

B. Lost wages and lost pension benefits.

C. $70,000.00 in compensatory damages.

D. $1,000,000.00 in punitive damages from Dennis Kornwolf.

E. Attorneys fees and costs.

F. Such other relief as is just.

PLAINTIFFS DEMAND TRIAL BY JURY.

DATED this 7 day of October, 1994.

ADELMAN, ADELMAN & MURRAY, S.C.

By: /s/ Elizabeth Adelman
Elizabeth Adelman
State Bar No. 1014258

P. O. Address:

308 East Juneau Avenue
Milwaukee, WI 53202
414-225-2920

BAILIFFS FOR STATE OF WISCONSIN
Located in Racine County

Bailiffs are appointed by the circuit Court Judges of Racine County. They are supervised by the judges and the Clerk of Courts Office. Their duties include the supervision of jurors and they provide general assistance to the court and the public as is necessary. No bailiff may work more than 540 hours in a calendar year, salary $5.50 per hour. No benefits are attached to this position.

Persons applying must be able to work flexible hours, which may include weekends, have good verbal skills, have the ability to follow and give directions and have a general knowledge of legal proceedings.

Interested applicants can apply at the Racine County Personnel Department, 730 Wisconsin Avenue, Racine WI 63403. Your application will be forwarded to the Clerk of Courts office: Persons applying at this time will be considered for bailiff positions through December 31, 1992. The bailiff positions are judicial appointments and bailiffs are not considered employees of either Racine County or the State of Wisconsin. Stephen A. Simanek, Chief Judge.

Deadline for accepting applications:
August 21, 1992

Representatives for Bailiffs
Shirley Dandeneau – 639-620
Joe Porcaro – 639-262

10/11/92

County Executive Dennis Kornwolff:

The Racine County Bailiffs are more than willing to pay the state retirement cost. We would appreciate a meeting at your earliest convenience to discuss this matter.

Sincerely,

Shirley Dandeneau
Joe Porcaro

Bonnie E. Fuller
Edward E. Bowmen
Eva J Christopherson
B.J. Wynhoff
Sally Guzek
John J. Greco
Helen L. Hess
Robert P. Bertermann
Jay Wildfong

APPEAL TRIBUNAL DECISION

MILWAUKEE HEARING OFFICE
819 N. 6th Street, Room 382
Milwaukee, WI 53203
Telephone: (414) 227-4416
Fax: (414) 227-4264

State of Wisconsin
Department of Industry
Labor and Human Relations
Unemployment Compensation

Mailed to:

SHIRLEY DANDENEAU
4330 N GREEN BAY RD
RACINE, WI 53404-1214

Hearing No. 93602248ROG

In the matter of:

Employee: EDWARD E BOWMAN, ET AL., RESPONDENTS

L.O. & S.S. No. 18/390-24-8016
vs.
Employer: COUNTY OF RACINE, APPELLANT

UC Account No. 692049

APPEAL RIGHTS

THIS DECISION WILL BECOME FINAL UNLESS A WRITTEN APPEAL IS FILED WITHIN 21 DAYS FROM THE DATE OF THIS DECISION. (SEE DATE BELOW.) THE APPEAL MAY BE FILED AT A LOCAL UC OFFICE, A UC HEARING OFFICE, OR THE LABOR AND INDUSTRY REVIEW COMMISSION OFFICE. THE COMMISSION WILL REVIEW THE EVIDENCE ALREADY

PRESENTED AT THE HEARING TO MAKE A DECISION. NO FURTHER HEARING WILL BE HELD UNLESS THE COMMISSION SO ORDERS.

A CLAIMANT WHO IS STILL UNEMPLOYED SHOULD CONTINUE TO FILE CLAIMS WHILE THE REVIEW IS PENDING. IF THIS DECISION ALLOWS BENEFIT PAYMENT, PAYMENTS WILL BE MADE AND WILL CONTINUE UNLESS A LATER DECISION DENIES BENEFIT PAYMENT. IF THIS DECISION OR ANY HIGHER LEVEL DECISION REVERSES AND RESULTS IN A DENIAL OF BENEFIT PAYMENT, THE CLAIMANT WILL BE REQUIRED TO REPAY PREVIOUSLY PAID BENEFITS.

ANOTHER HEARING WILL NOT BE SCHEDULED UNLESS A PARTY WHO FAILED TO APPEAR SHOWS GOOD CAUSE FOR NOT APPEARING AT THE HEARING ORIGINALLY SCHEDULED. THE REQUEST FOR RESCHEDULING MUST BE IN WRITING, MUST EXPLAIN THE REASON FOR FAILING TO APPEAR, AND SHOULD BE MAILED IMMEDIATELY TO THE UC HEARING OFFICE ABOVE. IF YOU DO NOT UNDERSTAND THE PROCEDURE, CALL THE UC HEARING OFFICE FOR ASSISTANCE.

DECISION: SEE ATTACHED DECISION WHICH AFFIRMS THE INITIAL DETERMINATION.

Employee appeared by: IN PERSON

Employer appeared by:
SUSAN C. JOHNSTON
ASST CORPORATION COUNSEL

Administrative Law Judge
KEVIN CARR

Dated and Mailed
APRIL 19, 1993

Appeal Must Be Received Or Postmarked by:
MAY 10, 1993

(SEE REVERSE FOR ADDITIONAL INFORMATION)

Decision mailed to:
GROUP APPENDIX (ATTACHED)
COUNTY OF RACINE, % COUNTY CLERK, RACINE CTY CTHSE, RACINE, WI 53403

THE DEPARTMENT'S INITIAL DETERMINATION HELD: that in the case of each of the claimants the services of the claimants were performed in employment covered by Wisconsin unemployment compensation law, that the claimants' services were not excluded employment as appointed public officials, and allowed benefits based on services for the employing unit, a governmental subdivision.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

FINDINGS OF FACT and CONCLUSIONS OF LAW

The claimants performed services as bailiffs, or court attendants as they had been renamed beginning in 1993. Their primary function is to assist the court in jury trials with the managing of the juries. The bailiffs were hired by the clerk of courts. Their hiring was approved by the

chief judge and was formalized by an appointment order. The bailiffs work under the direct supervision of the clerk of courts. When a bailiff is not immediately working with the court or a jury, the clerk of courts would, on occasion, assign clerical duties to the bailiffs.

The rate of pay for the bailiffs was set by county board resolution. The bailiffs are given a set of rules that were written by the clerk of courts and reviewed by the chief judge. The bailiffs would wear a suit jacket provided by the county as a type of uniform. The bailiffs were paid with a county payroll check from which taxes were withheld. They received a W-2 Form at the end of the year.

In September of 1992 the bailiffs were laid off by directive of the county executive. The purpose of the layoff was to prevent the bailiffs from working a certain number of hours after which the bailiffs would be eligible for state mandated benefits.

In questioning benefit eligibility the employer originally alleged that the bailiffs were excluded under § 108.02(15)(f)3 of the statutes, "As members of a legislative body or the judiciary of a state or political subdivision." The initial determination rejected that argument. On appeal the employer abandoned that allegation but raised the allegation that the bailiffs performed their services as independent contractors, or in the alternative, as employes [sic] of the court and/or for the state instead as employes [sic] of the county.

The arguments of the county-appellant are specious. The county provided not a shred of evidence to demonstrate that the services of the bailiffs were performed free

from the direction and control of the county or in an independently established trade, business or profession. Moreover, the services of the bailiffs accrued directly to the county and not to the state. The court served country cases. The supervision was done by county employes [sic]. The county board set compensation. The county executive ordered the layoff. The county personnel department provided the paychecks. The most outrageous factor is that court clerks, whose employment is similarly at the pleasure of the circuit court judges, are considered by the county to be county employes. The only differences is that the court clerks are unionized and the bailiffs are not. The issues raised by the employer before and after the appeal demonstrated a shameful compounding of the ill-use of the more vulnerable county employes [sic].

The appeal tribunal therefore finds that as of week 38 of 1992, the claimants performed their services for the employer in an employment covered by Wisconsin unemployment compensation law, within the meaning of §§ 108.02(12), 108.02(15) and 108.09(2) of the statutes.

DECISION

The department's initial determination are affirmed. Accordingly, benefits are allowed, if the claimants are otherwise qualified.

APPEAL TRIBUNAL

By /s/ Kevin Carr
Kevin Carr
Administrative
Law Judge

EXHIBIT D

STATE OF WISCONSIN CIRCUIT COURT
RACINE COUNTY

ORDER APPOINTING CIVILIAN BAILIFFS

Pursuant to the Racine County Circuit Courts' inherent power to make rules and orders necessary to properly perform their function and,

Pursuant to Section 8, Article VII of the Wisconsin Constitution and,

Pursuant to Wisconsin Stats. Sec. 753.10,

The Racine County Circuit Court Judges order:

1. The following named individuals are appointed as civilian bailiffs to attend upon the Racine County Courts:

Robert Bertermann	Jay Wildfong
Eva Christopherson	Ed Bowman
Joan M. Flynn	Shirley Dandeneau
John Greco	Bonnie Fuller
Helen Hess	Sally Guzek
Paul Rosenquist	Joe Porcaro
Florence Stupar	Bernard J. Wynhoff

2. The authority of the above-named individuals is limited to:

a) The administration of case flow,

b) Taking charge of juries, and

c) Any other duties specifically requested by the presiding judge.

3. The above-appointed bailiffs are specifically not authorized to take any individual into custody; not authorized to physically evict any individual from the courts; and not authorized to guard criminal defendants.

4. The order is effective immediately this date, December 19, 1991 and shall expire January 31, 1993.

BY THE COURT:

Dated: Jan. 9, 1992
/s/ Gerald P. Ptacek
Honorable Gerald P. Ptacek
Branch I

Dated: 12-23-91
/s/ Stephen A. Simanek
Honorable Stephen A. Simanek
Branch II

Dated: Jan. 7, 1992
/s/ Emmanuel J. Vuvunas
Honorable Emmanuel J. Vuvunas
Branch IV

Dated: 12/26/91
/s/ Dennis J. Barry
Honorable Dennis J. Barry
Branch V

Dated: Jan. 7, 1992
/s/ Wayne J. Marik
Honorable Wayne J. Marik
Branch VI

Dated: Jan. 9, 1992
/s/ Nancy E. Wheeler
Honorable Nancy E. Wheeler
Branch VII

Dated: 9 JAN 92
/s/ Dennis J. Flynn
Honorable Dennis J. Flynn
Branch VIII

Dated: 21 JAN 92
/s/ Allan B. Torhorst
Honorable Allan B. Torhorst
Branch IX

EXHIBIT E

STATE OF WISCONSIN CIRCUIT COURT
RACINE COUNTY

ORDER APPOINTING COURT ATTENDANTS

Pursuant to the Racine County Circuit Courts' inherent power to make rules and orders necessary to properly perform their function and,

Pursuant to Section 8, Article VII of the Wisconsin Constitution and,

Pursuant to Wisconsin Stats. Sec. 753.10,

The Racine County Circuit Court Judges order:

1. The following named individuals are appointed as court attendants to attend upon the Racine County Courts:

George Janosik	Sharon Mullen	Robert Bertermann
Maureen Eckert	John Swan	James Vernon
Bernice Christensen	Donald Bostick	Jay Wildfong
Eva Christopherson	Ed Bowman	Mickey Turkowski
John Greco	Bonnie Fuller	Judy Winsall
Joe Pocaro	Bernard J. Wynhoff	Greta Andersen
Janet Gergen	Paul Rosenquist	Sally Guzek

2. The authority of the above-named individuals is limited to:

a) The administration of case flow,

b) Taking charge of juries, and

c) Any other duties specifically requested by the presiding judge.

3. The above-appointed court attendants are specifically not authorized to take any individual into custody; not authorized to physically evict any individual from the courts; and not authorized to guard criminal defendants.

4. Court Attendants' work shall be limited to 599 hours of work in any 12 month period.

5. This order expires on 12-31-93.

BY THE COURT:

Dated: 3/18/93 /s/ Gerald P. Ptacek
Honorable Gerald P. Ptacek
Branch I

Dated: 3/18/93 /s/ Stephen A. Simanek
Honorable Stephen A. Simanek
Branch II

Dated: 3/18/93 /s/ Emily S. Mueller
Honorable Emily S. Mueller
Branch III

Dated: 3-29-93 /s/ Emmanuel J. Vuvunas
Honorable Emmanuel J. Vuvunas
Branch IV

Dated:
MARCH 19, 1993 /s/ Dennis J. Barry
Honorable Dennis J. Barry
Branch V

Dated:
March 18, 1993 /s/ Wayne J. Marik
Honorable Wayne J. Marik
Branch VI

Dated: 3-19-93 /s/ Nancy E. Wheeler
Honorable Nancy E. Wheeler
Branch VII

Dated:
18 MARCH 1993

/s/ Dennis J. Flynn
Honorable Dennis J. Flynn
Branch VII

Dated: 3-18-93

/s/ Allan B. Torhorst
Honorable Allan Pat Torhorst
Branch IX

Supreme Court, U.S.
FILED
SEP 16 1996
CLERK

No. 96-254

In The

Supreme Court of the United States

October Term, 1995

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, JOHN GRECO and JOSEPH PORCARO,

Petitioners,

vs.

DENNIS KORNWOLF and STEPHEN SIMANEK, in their individual capacities, and RACINE COUNTY, a municipal corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, DENNIS KORNWOLF AND RACINE COUNTY, IN OPPOSITION TO GRANTING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARK JANIUK
Counsel of Record

LESLIE SCHMERIN

Counsel for Respondents

Racine County Corporation Counsel
Courthouse
730 Wisconsin Avenue
Racine, WI 53403
(414) 636-3115

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

QUESTIONS PRESENTED FOR REVIEW

Racine County and Dennis Kornwolf believe that the questions properly before this Court are as follows:

1) Where state law provides that an employment contract which provides for employment for a specified duration creates a property interest, does a court order which appoints individuals as bailiffs and which has an expiration date for the court order create a property interest where the court does not provide for employment for a specified duration and does not expressly prohibit the court from terminating the bailiffs without cause?

2) If the Seventh Circuit erred in applying certain Federal case law in ruling that the court order here involved created no property interest of the Petitioners triggering due process protections, does such error warrant remand of this case to the Seventh Circuit for a reconsideration of such ruling?

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STATUTORY PROVISIONS INVOLVED

Wis. Stat. § 5.02(23)

> "State office" means the offices of governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent of public instruction, justice of the supreme court, court of appeals judge, circuit court judge, state senator, state representative to the assembly and district attorney.

Wis. Stat. § 751.02

> **Employes.** The Supreme court may authorize the employes it considers necessary for the execution of the functions of the supreme court and the court of appeals and the court reporting functions of the circuit courts and may designate titles, prescribe duties and fix compensation. Compensation and benefits of employes should be consistent with that paid to state employes in the classified service for services involving similar work and responsibility. Each justice and court of appeals judge may appoint and prescribe the duties of a secretary and a law clerk to assist the justice or judge in the performance of his or her duties. Each circuit judge may appoint a court reporter to serve in the court or branch of court to which he or she was elected or appointed if the reporter is certified as qualified by the director of state courts. A person appointed by the supreme court or a justice or court of appeals judge or a circuit judge serves at the pleasure of the court or the justice or judge.

Wis. Stat. § 753.10(3) (1991-1992).

> **Attendance of officers, pay; opening court.** (3) Unless otherwise directed by the presiding judge, no officer, other than the clerk, shall be paid for attending court or the judge if the court is not engaged in the trial of jury cases. Every officer attending court upon the order of the presiding judge shall have the same powers and authority as the sheriff, and shall be paid out of the County treasury, upon the certificate of the judge, compensation equal to that fixed by the County board. No such officer may be paid for any day when the court is not in session unless specially ordered by the presiding judge.

STATEMENT OF CASE

Respondents Dennis Kornwolf and Racine County adopt and incorporate herein Respondent Stephen Simanek's Statement of Case as set forth in his Brief in Opposition to Granting a Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

There are no compelling reasons why this court should grant a petition to review this case. Contrary to Petitioners' assertions, this case does not involve a federal question or a departure from prior decisions of this Court or any other court of appeals. In fact, the Seventh Circuit's decision was properly grounded on Wisconsin state law which is the only law that governs the outcome of this case.

Contrary to Petitioners' assertion that the Seventh Circuit based its opinion on "explicitly mandatory language", the court merely made a passing reference to that concept. Even if the court did refer to "explicitly mandatory language", this Court has made clear that although the concept has been abandoned in the context of prisoner litigation, it is preserved for use in other contexts involving the general public. Because this case involves the general public, there is nothing fatal about the Seventh Circuit's passing reference to "explicitly mandatory language" in its decision.

Furthermore, even if the Seventh Circuit misinterpreted Wisconsin law, it properly concluded that a court order is not a civil service regulation or law, contract or collective bargaining agreement. Finally, Circuit Court judges in Wisconsin are state employees and as such are not authorized to enter into employment agreements on behalf of the county.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR THIS COURT TO REVIEW THIS CASE.

Rule 10 of the Supreme Court Rules sets forth the considerations which this Court relies upon in determining whether to grant a petition for a writ of certiorari. A petition for certiorari will be granted only for compelling reasons. SCR 10. Rule 10 of the rules of this Court reads, in part:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the court considers:

(a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important Federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this court's supervisory power;

. . . .

(c) . . . A United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Petitioners put forth no compelling reasons for review of the Seventh Circuit's decision. There is no conflict between different circuits. This decision does not involve federal questions or a departure from prior decisions of this Court or any other court of appeals. The decision in this case rests solely upon the application of Wisconsin state law to an alleged termination of employment cause of action. For that reason, this court should decline to review this case.

II. THE SEVENTH CIRCUIT'S DECISION PROPERLY INTERPRETED AND APPLIED WISCONSIN LAW WHEN DETERMINING WHETHER PETITIONERS HAD A PROPERTY INTEREST IN THEIR EMPLOYMENT AS CIRCUIT COURT BAILIFFS.

The existence of a substantive property interest in employment is ordinarily a question of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The events giving rise to this litigation arose in Wisconsin, therefore, the law of that state applies.

"When called upon to decide the question whether an employee possesses a property interest in employment, Wisconsin courts have generally resolved the matter by providing a simple yes or no answer based on whether the employment is at will or for cause." *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1405 (7th Cir. 1994). "Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment." *Vorwald v. School Dist. of River Falls*, 482 N.W.2d 93, 96, *cert. denied*, ___ U.S. ___, 113 S.Ct. 378, 121 L.Ed.2d 289 (1992).

The Seventh Circuit properly interpreted and applied Wisconsin law in determining that Petitioners had no property right in their employment as circuit court bailiffs. It is clear from reading the decision of the Seventh Circuit that their decision was based on the fact that the petitioners were relying on a court order as opposed to a contract, collective bargaining agreement or civil service

regulations or laws. The Seventh Circuit began its analysis by noting that the court order lists the plaintiffs names and defines their authority and that *the order expires on December 31, 1993.* (Emphasis added.) The Seventh Circuit then proceeds to quote the sections of the *Vorwald* case that were cited above in this section. The Court then states that the "order appointing them to their positions did contain an expiration date" but that the order placed no substantive restriction on the county's or the appointing judges' authority to terminate the plaintiff before the court order expired.

It is clear that the Court of Appeals was addressing a court order which it did not consider to be a contract, collective bargaining agreement or civil service regulation or law. The Court of Appeals also found that the court order, although it had an expiration date, did not have a specific date for the termination of employment and did not have any other substantive restriction on the authority to terminate. This is clearly in conformance with Wisconsin law regarding employment at will. *See, Heinritz v. Lawrence University,* 535 N.W. 2d 81 (Ct. of App. 1995); *Forrer v. Sears, Roebuck & Company,* 153 N.W.2d 587, 589-90 (Wis. 1967).

Based on its correct interpretation of Wisconsin law and the above described analysis, the Seventh Circuit concluded that no property rights of the Petitioner were violated. For that reason, there is no basis for review by this Court.

III. THE SEVENTH CIRCUIT'S REFERENCE TO "EXPLICITLY MANDATORY LANGUAGE" WAS NOT FATAL TO ITS DECISION THAT THE COURT ORDER DID NOT CREATE A PROPERTY INTEREST IN EMPLOYMENT.

In its decision, the Seventh Circuit made passing reference to the fact that "[n]owhere does the court order state in 'explicitly mandatory language' that the appointing judges have limited discretion to terminate the plaintiffs' employment at the judges' will." The petitioners' whole argument for certiorari relies on the fact that the Seventh Circuit made this passing reference to "explicitly mandatory language". This reference is not fundamental or essential to the Seventh Circuit's decision. The sentence containing that phrase could easily be omitted from the order and not in any way change the validity of the Seventh Circuit's decision or the Seventh Circuit's correct conclusion based on Wisconsin case law, that no property interest was created by the court order.

In addition, when this court abandoned the use of "explicitly mandatory language" in the prisoner litigation context, it very clearly preserved its use in other contexts. Therefore, contrary to petitioner's assertion, there is nothing fatal about the Seventh Circuit's reference to "explicitly mandatory language" within the context of a property interest in employment. In *Sandin v. Conner*, 515 U.S. ___, 132 L.Ed.2d 418, 428, 115 S.Ct. 2538 (1995) (emphasis added), this court held:

> By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb

> regulations in search of mandatory language on which to base entitlements to various state-conferred privileges. Courts have, in response, and not altogether illogically, drawn negative inferences from mandatory language in the text of prison regulations. The Court of Appeals' approach in this case is typical: it inferred from the mandatory directive that a finding of guilt "shall" be imposed under certain conditions the conclusion that the absence of such conditions prevents a finding of guilt
>
> *Such a conclusion may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public. It is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison.*

As indicated above, the Seventh Circuit's passing reference to "explicitly mandatory language" did not provide the basis for its decision that the court order did not create a property interest in the bailiffs' employment, and the use of the term "explicitly mandatory language" in and of itself does not jeopardize the Seventh Circuit's decision. For that reason, there are no compelling reasons for this Court to take this matter on review.

IV. EVEN IF THE SEVENTH CIRCUIT MISINTERPRETED WISCONSIN LAW, THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT.

A. The Seventh Circuit Properly Concluded That Under Wisconsin Law, A Court Order Is Not A Civil Service Regulation Or Law, Contract Or Collective Bargaining Agreement.

Even if the Seventh Circuit misinterpreted Wisconsin law as petitioners have alleged, there is still no compel-

ling reason for this Court to review this matter since the decision of the Seventh Circuit still is correct in that the petitioners had no property interest in their employment. There is no compelling reason to be served by having this Court review the Seventh Circuit's decision. Both the Seventh Circuit and District Court Judge Reynolds relied on *Vorwald v. School Dist. of River Falls*, 482 N.W.2d 93, 96, *cert. denied*, 506 U.S. 941 (1992). In that case, the Wisconsin Supreme Court held that "absent civil service regulations or laws, or a contract or collective bargaining agreement, a [public] employee is an employee at will and has no property interest in employment." *Id.*

District Court Judge Reynolds, in his decision, emphasizes that the plaintiffs were relying on a court order and that the *Vorwald* case clearly refers to contracts, collective bargaining agreements or civil service laws. Judge Reynolds held that the court order was not a contract. Judge Reynolds also held that the plaintiffs never used the word "contract" in their complaint and never claimed that they had a contract. Judge Reynolds' decision and the Seventh Circuit's decision upholding Judge Reynolds' order clearly were correct.

A court order is not a contract. The contracts and collective bargaining agreements that the Wisconsin Supreme Court refers to in *Vorwald* are documents that come out of bargaining between the parties. A contract is based on a mutual meeting of the minds as to terms manifested by mutual assent. *Goossen v. Estate of Standaert*, 525 N.W.2d 314 (Ct. App. 1994). Employment contracts and collective bargaining agreements are the instruments used when contracting parties wish to place

restrictions or abrogate the general employment-at-will rights of employers in Wisconsin. In *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 269 (7th Cir. 1995), the court stated:

> Wisconsin has a strong presumption in favor of employment at will. *Forrer v. Sears, Roebuck & Company*, 36 Wis. 2d 388, 153 N.W.2d 587, 589-90 (1967). To overcome this presumption, a plaintiff must show that both parties intended to restrict the reasons for which an employee could be discharged.

Thelen makes clear that the court is to examine the intent of the parties and determine whether the parties intended to restrict the employer's rights to discharge an employee. In the context of a contract or a collective bargaining agreement, the parties can express their intent and they can clearly indicate that they are going to restrict employment at will. The same is not true in a court order. In this case in particular, the order entitled "Order Appointing Civilian Bailiffs", indicates that there were no parties before the court. This was an administrative order. *See State v. Cannon*, 221 N.W. 603 (1928). In issuing this order, the Circuit Court was trying to comply with § 753.10 of the Wisconsin Statutes which reads, in part:

> (3) Every officer attending court upon the order of the presiding judge shall have the same powers and authority as the sheriff and shall be paid out of the county treasury upon certificate of the judge, compensation equal to that fixed by the county board.

In appointing the bailiffs, the Circuit Court was merely designating those people who were authorized by

court order to be officers attending the court. This certainly was not a document which purported to show the intent of the parties and nowhere within the court order does it clearly indicate that there was an intent to restrict the general provision of employment at will. In fact, Sec. 751.02 Wis. Stats., which specifically addresses the Court's power to appoint law clerks and court reporters, provides in part:

> A person appointed by the supreme court or a justice or court of appeals judge or a circuit judge serves at the pleasure of the court or the justice or judge.

Petitioners have not suggested that the court could not have amended the court order *sua sponte* or rescinded the order since it was merely an administrative order. Just as the court's inherent authority allowed it to issue the original order that authority would allow it to amend or rescind the order.

The conclusion that the court order does not create any property rights is further reinforced by the fact that the order does not contain normal and essential employment terms. The order does not indicate a rate of compensation and does not indicate hours of employment. In fact, the order does not provide for any mininum number of hours at all for the bailiffs. The absence of these basic employment terms clearly demonstrates that this order was not meant to create any employment or property rights.

In fact, it was the county board that set the compensation rate of the bailiffs. (Petitioners' App. p. 42). As indicated in the petitioners' argument, these were not full

time positions. These were on call positions with no guarantee of any particular number of hours. (Petitioners' App. p. 4). The Racine Circuit Court Judges could have issued another order appointing additional bailiffs and used bailiffs exclusively from the second order. Nothing in the original court order or in the law required the local judges to use any of the petitioners for any specific number of hours. The above analysis demonstrates how different this court order is from the contractual arrangement contemplated in *Vorwald*.

B. The Circuit Court Judges Who Signed The Order Were Not Authorized To Enter Into An Employment Relationship On Behalf Of Racine County Because The Judges Are State Employees, Not County Agents.

The court order was signed by various state court judges. In Wisconsin, circuit court judges are not county employees. *Iowa County v. Iowa County Courthouse/Social Services Employees, Local 413, AFSCME, AFL-CIO*, 480 N.W.2d 499 (1992). Circuit court judges in Wisconsin are state employees:

> "State office" means the offices of governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent of public instruction, justice of the supreme court, court of appeals judge, circuit court judge, state senator, state representative to the assembly and district attorney.

Section 5.02(23) Wis. Stats.

Petitioners do not argue that the order in question made the Bailiffs state employees. Rather, petitioners

have always argued that the bailiffs were employees of Racine County. (Petitioners' App. pp. 38-42). In fact, a decision by the Wisconsin Department of Industry, Labor and Human Relations Employment Compensation Division, which the petitioners incorporated in their petition, found that the bailiffs were county employees and states as follows:

> Moreover, the services of the bailiffs accrued directly to the county and not to the state. The court served country [sic] cases. The supervision was done by county employes [sic]. The county board set compensation. The county executive ordered the layoff. The county personnel department provided the paychecks. (Petitioners' App. p. 42).

Clearly, the court order cannot reflect the intent of the parties, employer and employee, if the court order was issued by circuit court judges who were not agents of or authorized by the actual employer, Racine County, to enter into any kind of employment relationship with the bailiffs.

Because a court order in Wisconsin is not a civil service regulation or law, contract or collective bargaining agreement, the court order in question did not create any property rights in the bailiffs. Because the decisions of both District Court Judge Reynolds and the Seventh Circuit were correct, no purpose would be served by remanding this matter back to the Seventh Circuit.

CONCLUSION

Certiorari should be denied because there are no compelling reasons for this Court to review this case. The Seventh Circuit's decision rests solely upon the application of Wisconsin state law to an alleged termination of employment cause of action. Because the Seventh Circuit properly interpreted and applied Wisconsin law in this case, there is no reason to grant the writ of certiorari. The Seventh Circuit's passing reference to "explicitly mandatory language" was neither fundamental nor essential to its decision that the circuit court order did not create a property interest in the bailiff's employment. Even if the Seventh Circuit misinterpreted Wisconsin law, the court's decision was correct because a court order is not a civil service regulation or law, contract or collective bargaining agreement. Finally, Wisconsin circuit court judges are state employees and therefore cannot enter into employment agreements on behalf of a county. For these reasons, Racine County respondents respectfully request that the Court reject petitioners' request for a writ of certiorari.

Respectfully submitted,

MARK JANIUK
Counsel of Record

LESLIE SCHMERIN

Counsel for Respondents Dennis Kornwolf and Racine County

Racine County Corporation Counsel
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403
(414) 636-3115

(3)

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No. 96-254

In The

Supreme Court of the United States

October Term, 1995,

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, JOHN GRECO and JOSEPH PORCARO,

Petitioners,

v.

DENNIS KORNWOLF and STEPHEN SIMANEK, in their individual capacities, and RACINE COUNTY, a municipal corporation,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT, STEPHEN SIMANEK, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES E. DOYLE
Attorney General

JAMES H. MCDERMOTT
Assistant Attorney General
State Bar No. 1003468
Attorneys for Judge Simanek

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859

18 pp

QUESTION PRESENTED FOR REVIEW

The petitioners discern two questions presented for review. Judge Simanek discerns but one such question, and submits that it is this: If the Seventh Circuit erred in applying certain Federal case law in ruling that the court order here involved created no property interest of the petitioners triggering due process protections, does such error warrant remand of this case to the Seventh Circuit for a re-consideration of such ruling?

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BRIEF OF RESPONDENT, STEPHEN SIMANEK, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondent, Stephen Simanek, reflecting his judicial status as a Circuit Judge of the State of Wisconsin, will hereinafter be called "Judge Simanek;" and the Petition for Writ of Certiorari filed herein "The Petition." The United State Court of Appeals for the Seventh Circuit will hereinafter be called "Seventh Circuit."

STATEMENT OF THE CASE

Respondent Judge Simanek agrees with the statement of the case set down by petitioners except for the following objectionable features. Such features are:

(1) The presence at p. 3, The Petition, of the paragraph commencing, "[b]eginning on May of 1991," consisting entirely of matters dehors the record.

(2) The presence in The Petition of other matters dehors the record. They are: (a) the statement at p. 4 thereof that, "In the summer of 1992, Respondent, Racine County Executive Dennis Kornwolf, decided that the Petitioners should be laid off to prevent them from obtaining pension coverage for 1992;" (b) the statement at p. 5 thereof that, "Because of the resulting reduction in hours of available work, two court attendants were forced to retire;" (c) the statement at p. 5 thereof that, "He [Judge Simanek] also notified them that if they wished to apply to the Kelly Temporary Service, they would be assigned to the courthouse and would perform the same duties they had previously performed as county employees" (bracketed material supplied); and (d) the statements at p. 5 thereof that, "The cost to Racine County, per hour, to employ the part-time court attendants was $6.54 without pension, and $6.90 with pension. The cost to Racine County, per hour, to appoint Kelly Temporary Service employees to the same position was $7.20 per employee."

(3) The presence in The Petition, at p. 4, of the assertion that "Kornwolf undertook these layoffs despite the bailiffs having offered to work for less pay in order to keep their jobs (App. 37), and despite the Racine County Corporation Counsel having advised that the layoffs were illegal." Such assertions are objectionable because App. 37 does not show "the bailiffs having offered to work for less pay in order to keep their jobs," and because the record here involved is devoid of any showing that "the Racine

County Corporation Counsel . . . advised that the layoffs were illegal."

(4) The presence in The Petition of argumentative language, namely, the reference in the last paragraph of p. 4 thereof to "the court order specifying that the Petitioners were employed until January 31, 1993 . . . ." (Emphasis supplied.)

SUMMARY OF ARGUMENT

A.

Petitioners submit, as their first reason for granting the writ sought herein, that "Certiorari should be granted to make clear that the Seventh Circuit Court of Appeals' use of the 'explicitly mandatory language' standard to determine whether the petitioners had a property interest in their employment was error because state law provides the sole reference for determining such interests." The Petition, p. 9. Assuming, for purposes of argument only, that the Seventh Circuit erred in employing the "explicitly mandatory language" standard, derived from Federal case law, in determining that the petitioners had no property interest in their employment, it is then submitted that such error was innocuous, because under Wisconsin case law, not resorted to by the Seventh Circuit, petitioners clearly had no property interest in their employment. Consequently, no worthwhile legal interest would be served by a decision of this Court that the assumed error above-described was committed by the Seventh Circuit, since there is no good reason to presume that Federal courts in general will be prone to the commission of such error.

B.

Petitioners submit, as their second reason for granting the writ sought herein, that "Certiorari should be granted to make clear that the 'explicitly mandatory language' standard, which this court has never approved in the property interest context, and has recently rejected in the prisoners' rights context, should not be used by Federal courts to determine whether a property interest exists." The Petition, p. 16.

Pertinent, quoted parts of Rule 10 of the Rules of this Court show no compelling reason for granting the writ sought herein.

While Rule 10 does not cover all of the compelling reasons for granting a writ of certiorari, this case presents no compelling reason other than one of those described in Rule 10, for granting the writ. Again assuming, for purposes of argument only, that the Seventh Circuit erred in its application of the "explicitly mandatory language" standard, the innocuous nature of such application rules out the existence of any truly compelling reason for granting the writ sought herein. Had such application denied the petitioners a property right in their employment to which they were entitled, a compelling reason would arguably have existed for granting the writ; but no such denial occurred.

Petitioners apparently believe that the writ should issue herein for warning and instructional purposes; with petitioners apparently believing that an opinion issuing such writ and remanding this case to the Seventh Circuit for reconsideration of so much of its decision as involved application of the "explicitly mandatory language" standard would serve as a warning device and instructional tool for lower Federal courts. But the reason, if any, for issuance of the writ to serve such purposes falls far short of a truly compelling reason for issuance of the writ herein.

ARGUMENT

THE REASONS PRESENTED BY PETITIONERS FOR GRANTING THE WRIT OF CERTIORARI SOUGHT HEREIN ARE MERITLESS.

A.

Petitioners submit, as their first reason for granting the writ they seek, that "Certiorari should be granted to make clear that the Seventh Circuit Court of Appeals' use of the 'explicitly mandatory language' standard to determine whether the petitioners had a property interest in their employment was error because state law provides the sole reference for determining such interests." The Petition, p. 9.

In submitting such reason, petitioners first contend, and correctly, that "A. This Court has consistently held that state law is the sole reference by which property interests in employment are to be determined." The Petition, pp. 9, 10. They further contend, correctly, that "C. There is no requirement in Wisconsin law that language creating a property interest in employment must, in addition to specifying the duration of employment, contain 'explicitly mandatory language.'" The Petition, pp. 12, 13. They then assert, "D. The Seventh Circuit Court of Appeals refused to follow state law to determine whether the petitioners had a property interest in their employment." The Petition, p. 14. Such assertion is at least in some degree unfair to the Seventh Circuit, which, in ruling on the question of whether the court order here involved vested a property interest in their employment in the petitioners, specifically mentioned and quoted Vorwald v. School Dist. of River Falls (hereinafter "Vorwald"), 167 Wis. 2d 549, 482 N.W.2d 93 (1992), cert. denied, 506 U.S. 941 (1992), a case, as shown below, decisive on the above-described question. See App. 6. While the Seventh Circuit cannot be said to have ignored Vorwald, it chose, in

responding to petitioners' contention that the court order in question had "abrogated Wisconsin's general rule of at-will employment and made their employment terminable only for cause" to apply the "explicitly mandatory language" standard, stating that, "Absent such language, the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property interest that would trigger due process protections." App. 7. Such standard may have its provenance in Federal law, specifically in Hewitt v. Helms, 459 U.S. 460, 471, 472, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); with such standard relating to the creation and existence of a "liberty interest" triggering due process protections, rather than a property interest. This Court has now abandoned the methodology of seeking a liberty interest in the language of state regulations. See Sandin v. Conner, 115 S. Ct. 2293, 2300 (1995), and n.5 therein, at p. 2300; 132 L. Ed. 2d 418, n.5 at 429. Nevertheless, it is clear that the Seventh Circuit did apply such standard in reaching its decision herein on the effect of the court order in question.

Even if the Seventh Circuit had no Supreme Court precedent for its use of the "mandatory language" predicate in this context, must certiorari be granted here to correct any error? The answer, it is submitted, is an emphatic "No," in view of the innocuous nature of such assumed error. Why innocuous? Because, it is submitted, it is amply clear under Wisconsin case law, namely, Vorwald, cited supra, that the court order in question, by its very nature, could not and did not vest in the petitioners a property interest in their employment. Vorwald leaves no doubt on that score, by its unequivocal holding that, "Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment." (Emphasis supplied; Vorwald, 167 Wis. 2d at 557.) And obviously, the court order here in question is not a civil service regulation, a civil service law, a contract, or a bargaining agreement. Petitioners, in a patent and

futile effort to avoid the unfavorable impact of Vorwald on their claim to possess a property interest in their employment, argue, with reference to the above-quoted Vorwald holding, that, "The context in which the court made this statement makes clear that the court did not intend to exclude court orders as potential sources of property interests. The court was merely identifying the more typical kinds of documents which create property rights in employment. The court made clear later in the opinion that a variety of documents could create property interests and cited as examples employee handbooks and personnel policies." (The Petition, p. 11.)

The argument falls short. Vorwald, in its portion immediately above-quoted, did neither of the two things described in the first two sentences of such argument, nor did the Vorwald court make clear "later in the opinion that a variety of documents could create property interests and cited as examples employee handbooks and personnel policies." What such court did do, "later in the opinion," in finding that "the school district's personnel policy No. 4210 did not alter Vorwald's employee-at-will status," was to then declare that, "In some limited circumstances, employee handbook and personnel policies can abrogate the employment-at-will relationship." (Emphasis supplied.) This statement, it is submitted, does not show Vorwald as holding that "a variety of documents could create property interests" nor does it show Vorwald as citing, as examples of such "variety," employe handbooks and personnel policies. Instead, the two portions of Vorwald above quoted, read in conjunction, show Vorwald as holding that a municipal employe is an employe-at-will, and has no property interest in his/her employment, unless such interest is created by civil service regulations or civil service laws, or a contract, or a collective bargaining agreement; or, in some limited circumstances only, by employe handbooks and personnel policies. Clearly, a Wisconsin municipal employe can acquire a property interest in his/her employment only by one of the above-

described modes, none of which is a court order, or anything akin thereto.

Vorwald is one of several Wisconsin cases standing for the proposition that handbooks or personnel procedures may abrogate employment at will. See also, Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985) and Bantz v. Montgomery Estates, Inc., 163 Wis. 2d 973, 473 N.W.2d 506 (Ct. App. 1991). However, the handbook or policy in question only does so by including a term that the employe may be dismissed only for "just cause," which thus creates the binding employment contract abrogating employment at will, and, in the case of a public employer, amounts to a source for the constitutionally protected property interest in continuing employment. When there is no language containing a "just cause" provision, or where there is additional language limiting such an interpretation of the handbook, then the Wisconsin courts have refused to find a contract that abrogates employment at will. See Vorwald, 167 Wis. 2d at 558 (school district's self-imposed policy relating to discharge did not limit its common law right to discharge employe at any time); Bantz, 163 Wis. 2d at 983 (handbook that only suggests, but does not mandate progressive discipline and does not state that discharge will be only for "just cause" does not abrogate employment at will). In contrast in Ferraro, 124 Wis. 2d at 159, the employe handbook stated, "[The employer] policy requires that employees not be dismissed or laid-off without just cause." There, the Wisconsin Supreme Court was persuaded that the "just cause" language created a contract that abrogated employment at will.

However the court order at issue here may be construed, it most clearly is not a document that provided that the bailiffs would be terminated only for "just cause." The lack of this term, as the Seventh Circuit recognized, pre-empted the bailiffs' argument that they had a property interest created by the court order. Nothing in the court order abrogated the bailiffs' status as "at will" employes.

Therefore, nothing in the court order gave the bailiffs a property interest under Wisconsin law.

The Petition, at p. 12, asserts that because the court order in question stated that petitioners' employment "was for a specified duration, under Wisconsin law, it gave the Petitioners a property interest in their employment." (Emphasis supplied.) In response to this, it must first be observed that the order in question (App. 43, 44) contains no express statement that petitioners' employment "was for a specified duration"; and it is highly arguable that such order, merely because it provides that it is "effective immediately this date, December 19, 1991, and shall expire January 31, 1993" (App. 44), must be read as implying employment of petitioners "for a specified duration." Even if, however, it be assumed, for purposes of this argument only, that the court order in question so implies, it is then submitted that Wisconsin law nowhere holds that any instrument, paper, or thing indicating a "specified duration" for the employment of a municipal employe vests a property right to such employment in such employe. Instead, as Vorwald so clearly shows, such right can only be vested in a municipal employe by one of the modes so precisely described therein, none of them a court order. Petitioners assert that, "Wisconsin law provides that a property interest in employment exists where the employment is for a specified duration." The Petition, p. 10. It thereby implies that any mode creating employment for a municipal employe, so long as such employment is for a definite duration, creates a property interest in such employment. In support of such assertion, The Petition quotes the statement in Larson v. City of Tomah, 193 Wis. 2d 225, 232-33 n. 7, 532 N.W.2d 726, 729 n. 7 (1995) that, "An employee-at-will is one who is hired for an indefinite period of time and who may be discharged without cause." This statement, it is submitted, goes no further than to define what an "employee-at-will" is, and to observe that he/she "may be discharged without cause." And it is manifestly not a statement or holding which overrides Vorwald, and enables a municipal employe to acquire a

property interest in his/her employment in some manner other than by one of the modes described in Vorwald.

In closing this argument, two other aspects of The Petition merit some mention. First is its portion reading:

> The creation of a property interest under Wisconsin employment law does not depend on the form of the document establishing the employment relationship but on whether the document states that the employment is for a specified duration. The opinion of the Seventh Circuit Court of Appeals was correct to the extent that it recognized that under Wisconsin law a court order could be the source of a property interest in employment.

The Petition, p. 11.

In response to this, it is first submitted that the creation of a property interest for a municipal employe in his/her employment can only come about in Wisconsin, as Vorwald shows, through one of the modes specified therein. In further response, it simply is not true that the Seventh Circuit, in its decision here involved, "recognized that under Wisconsin law a court order could be the source of a property interest in employment." See App. 6, 7.

The second aspect of The Petition meriting some mention is its attempt, at pp. 11, 12, to put the court order in question into the Vorwald category of "civil service ... laws" which provide one of the modes whereby a municipal employe in Wisconsin can acquire a property interest in his/her employment. Obviously, however, to equate the court order in question, or any court order, with civil service laws, is to take an untenable position. Court orders are not laws of any kind, but sui generis. It has been said of a court order that it is a "judicial act" (see 60 C.J.S. Motions & Orders, § 1, p. 5); but the order in question is

arguably an administrative act. Judicial or administrative, it is plainly not a civil service law, or any kind of law, produced by legislative action, in which a court may not engage.

Here, it should perhaps be observed that in seeking to equate the court order in question with civil service laws, petitioners erroneously assert that, "under Wisconsin law, a court order employing court personnel is an example of judges exercising inherent power under the state constitution." (Emphasis supplied; The Petition, p. 12.) Not so. First, inherent powers in a judicial system are not those of a judge, but of a court. Second, they derive not from a constitution or from a statute, but from the nature of a court. As well put in State v. Cannon, 196 Wis. 534, 536, 221 N.W. 603 (1928), such powers, from time immemorial, "have been conceded to courts because they are courts." (Emphasis supplied.) Obviously, even if the court order in question was "an example of judges exercising inherent power under the state constitution," such example would provide no support for petitioners' effort to equate the court order in question with a civil service law, since the issuance of a court order, under constitution or statute, would do nothing to establish it as a civil service law, or other law, which it is not, no matter how issued. And as above shown, such example does not even exist.

In light of the foregoing argument it is, then, submitted that no worthwhile legal interest would be served by a decision of this Court that the assumed error above-described was committed by the Seventh Circuit, since there is no good reason to presume that Federal courts will be prone to the commission of such error.

B.

Petitioners submit, as their second reason for granting the writ sought herein that, "Certiorari should be granted to make clear that the 'explicitly mandatory

language' standard, which this Court has never approved in the property interest context, and has recently rejected in the prisoners' rights context, should not be used by federal courts to determine whether a property interest exists." The Petition, p. 16.

In pertinent part, Rule 10 of the Rules of this Court reads:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Plainly, the situation here involved shows no compelling reason, under the above-quoted rule language, for granting the writ sought herein.

As Rule 10 shows, however, it does not encompass all the "compelling reasons" which will produce a granting of the writ. Does this case present a compelling reason, other than one of those described in Rule 10, for granting the writ? It is submitted it does not. Even if the Seventh Circuit was relying upon outdated legal doctrine when it applied the "explicitly mandatory language" standard, it is submitted that the fact, shown above, that such application was innocuous rules out the existence of any truly compelling reason for granting the writ sought herein. Had the application of such standard been genuinely injurious to the petitioners, by denying to them a property right in their employment to which they were entitled, a compelling reason would arguably have existed for granting the writ. But such application did not so injure the petitioners.

From Argument II. of The Petition, pp. 16-19, it would seem that petitioners apparently believe that the writ should issue herein for what might be called warning and instructional purposes; with it apparently being petitioners' belief that an opinion issuing such writ, and remanding this case to the Seventh Circuit for reconsideration of so much of its decision as involved application of the "explicitly mandatory language" standard, would serve as a warning device and instructional tool for the lower Federal courts, trial and appellate. But the reason, if any, for issuance of the writ to serve such purposes falls far short, it is submitted, of providing a truly compelling reason for issuance of the writ.

CONCLUSION

For the reasons above shown, The Petition should be denied.

Respectfully submitted,

JAMES E. DOYLE
Attorney General
State of Wisconsin

JAMES H. MCDERMOTT
Assistant Attorney General
State Bar No. 1003468

Attorneys for Judge Simanek

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859